Hastings Law Journal

Volume 47 | Issue 2 Article 5

1-1996

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California Antitrust: Standing Room for the Wrongfully Discharged Employee?

by
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Introduction

> Gathered around a delicatessen table, officials of Obron Atlantic Corp. sat in stunned silence one day in November 1988. A federal grand jury subpoena had been served that morning on the little company, a maker of powdered brass, demanding information as part of a criminal price-fixing investigation. Over sandwiches, Obron General Manager James E. Owen broke the silence and wondered aloud to his lieutenants: Who could have sent investigators probing into their obscure industry?
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> "We sat there for an hour trying to figure out who started the investigation," says Warren Tisdale, Obron's controller at the time. The answer, Obron officials would learn much later, was none other than Mr. Owen, the German-owned company's top U.S. official. Using his insider's access and a $39.95 Radio Shack recorder, Mr. Owen taped unsuspecting executives at his and other companies brazenly coordinating industry-wide price increases.[1]

Antitrust violations are notoriously difficult to detect.[2] As the Obron Atlantic case demonstrates, without information from an insider, collusive arrangements often elude antitrust enforcement. Thus, employees of corporate violators can be fertile sources of incriminating evidence. As recognized centuries ago, "[w]hen you know others, then you are able to attack them."[3]

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1. Jeff Bailey, *Executive Mole: How an Officer of a Firm—Not ADM—Became an Antitrust Informer,* WALL ST. J., Aug. 10, 1995, at A1.

Although Owen was discharged before he was discovered to be the informant, this scenario demonstrates the value of insider information. *See infra* note 13.

2. *See, e.g.,* Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, Department of Justice, Address Before the Criminal Antitrust Law and Procedure Workshop, ABA Section of Antitrust Law (Feb. 23, 1995) (transcript available in Westlaw, 1995 WL 75292, at *7 (D.O.J.)) ("One of the most difficult challenges of criminal antitrust enforcement is becoming aware of the possibility that an antitrust crime has been committed.").

3. SUN TZU, THE ART OF WAR 83 (Thomas Cleary trans., 1988).

Unfortunately, whistleblowers like James Owen are rare; employees are unlikely to risk their employment, careers, and community standing to turn on the corporations that provide their income.[4] Inducement is needed. In the case of an employee discharged for whistleblowing or for refusing to participate in an antitrust violation, the courts may be able to provide the necessary inducement. Such an employee has suffered injury that is remediable through the courts. Thus, the courts may create an opportunity to take advantage of these pivotal wellheads of inside information by allowing wrongfully discharged employees[5] to redress their injuries under the antitrust laws.

The antitrust laws, however, are conventionally the province of consumers and competitors; under what precept may discharged employees wield antitrust plaintiff status? The core of both the federal and California antitrust laws is the preservation of free competition.[6] To further this goal, compensate injured parties, and deter potential violators,[7] both the federal Clayton Act and California's Cartwright Act enlist private attorneys general. Each Act accomplishes this enlistment by granting standing to "any person" injured "by reason of"

4. *See* Hal Lancaster, *Workers Who Blow the Whistle on Bosses Often Pay a High Price,* WALL ST. J., July 18, 1995, at B1 (discussing how whistleblowers may find career options limited because "[n]obody likes someone who tattles"); Carl Quintanilla & Anna D. Wilde, *You Dirty Rat, Says Decatur, Ill., of Mole at Archer-Daniels,* WALL ST. J., July 13, 1995, at A1 (discussing how a community rejected a "model citizen" because he blew the whistle on his employer's antitrust violations).

5. Although the phrase "wrongfully discharged employee" is conclusory, I use it in place of the more cumbersome phrase "employee allegedly discharged for refusal to participate in or for 'blowing the whistle' on alleged antitrust violations." For purposes of standing analysis, I assume that the defendant violated the relevant antitrust law and that the plaintiff was terminated for refusal to participate in that violation. As in the tort context, "wrongfully discharged" includes those who are actually discharged and those who are coerced to resign (known as a "constructive discharge"). *See, e.g.,* Turner v. Anheuser-Busch, Inc., 876 P.2d 1022, 1025 (Cal. 1994) ("Constructive discharge occurs when the employer's conduct effectively forces an employee to resign.").

6. *See* Act of Mar. 23, 1907, ch. 530, 1907 Cal. Stat. 984, 984 (stating that a purpose of the act is to promote free competition in commerce); Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (stating that the legislative history of the Clayton Act shows a "congressional concern with the protection of *competition,* not *competitors*"); Anne K. Bingaman, Assistant Attorney General, Antitrust Division, Department of Justice, Address Before the Criminal Antitrust Law and Procedure Workshop, ABA Section of Antitrust Law (Feb. 23, 1995) (transcript available on Westlaw at 1995 WL 75292, at *2 (D.O.J.)) ("Americans chose from the beginning of the Republic to organize their economy around the principle of open competition .... Price fixing and the other criminal violations of the Sherman Act are the antithesis of open competition.").

7. *See* Daniel Berger & Roger Bernstein, *An Analytical Framework for Antitrust Standing,* 86 YALE L.J. 809, 809 & n.2 (1977) (finding widespread recognition by courts of the compensatory and deterrent functions of private treble damage actions under federal antitrust law).

an antitrust violation.[8] Nevertheless, although private litigants represent an important source of antitrust enforcement,[9] a literal interpretation of this statutory language goes too far and would grant standing to litigants far removed from the antitrust violation.[10] Such violations cause economic "ripple" effects[11] with broad indirect impact. Thus, to avoid duplicative liability and the resulting excessive penalties, courts have developed standing requirements to limit the expansive statutory wording and to seek efficient enforcers.[12]

As James Owen of Obron Atlantic demonstrates, an employee may become an important source of enforcement information.[13] However, the question of whether an employee who is discharged for exposing antitrust violations[14] can seek redress under the antitrust statutes poses a complicated standing issue.

The United States Supreme Court has addressed the concept of antitrust standing several times.[15] Nonetheless, the federal appellate courts have split on the issue of whether a wrongfully discharged em-

8. The federal provision is found in section 4 of the Clayton Act, which states, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1994).

The California counterpart, found in the Cartwright Act, states, "[a]ny person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor . . . and to recover three times the damages sustained . . . and shall be awarded a reasonable attorneys' fee together with the costs of the suit." CAL. BUS. & PROF. CODE § 16750 (West 1987).

9. *See, e.g.,* RICHARD A. POSNER, ANTITRUST LAW 227-32 (1976) (arguing that, despite some excessive litigation, private actions have made an enormous contribution to antitrust enforcement).

10. *See* Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 529 (1983) ("A literal reading of [section 4 of the Clayton Act] is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation.").

11. *See* Blue Shield v. McCready, 457 U.S. 465, 476-77 (1982) ("An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy . . . .").

12. *See* Virginia G. Maurer, *Antitrust and Rico: Standing on the Slippery Slope,* 25 GA. L. REV. 711, 715 (1991) (listing policy considerations involved in antitrust standing questions).

13. Mr. Owen provided information to the Department of Justice, Antitrust Division before he was terminated. Bailey, *supra* note 1. However, Mr. Owen's motivation to provide evidence may have been the same as a wrongfully discharged employee. He was angry because Obron fired both of his daughters, he expected Obron to fire him, and he felt that providing information to the authorities would be "the only way to clear myself." *Id.* Eventually Obron did terminate Mr. Owen. *Id.*

14. For the purpose of this Note, an employee discharged for informing authorities of the defendant's violations is equivalent to an employee refusing to participate.

15. *See* Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 529 (1983); Blue Shield v. McCready, 457 U.S. 465, 480 (1982); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

ployee has standing under the federal antitrust laws.[16] Because of this split in authority, federal district courts have come to disparate results in factually similar cases.[17] The confusion has even led different judges in the same district court to opposite conclusions.[18] This disagreement between the courts has also spurred much scholarly comment.[19]

16. *See* Ostrofe v. H.S. Crocker Co., 670 F.2d 1378, 1379-80 (9th Cir. 1982), *vacated,* 460 U.S. 1007 (1983), *reinstated on remand,* 740 F.2d 739, 742 (9th Cir. 1984), *cert. dismissed,* 469 U.S. 1200 (1985) (allowing standing under section 4 of the Clayton Act); *In re* Industrial Gas Antitrust Litig., 681 F.2d 514, 519 (7th Cir. 1982), *cert. dismissed,* 460 U.S. 1016 (1983) (denying standing).

17. For cases allowing standing, see Ashmore v. Northeast Petroleum Div. of Cargill, Inc., 843 F. Supp. 759, 772 (D. Me. 1994); Donahue v. Pendleton Woolen Mills, Inc., 633 F. Supp. 1423, 1439 (S.D.N.Y. 1986); Shaw v. Russell Trucking Line, Inc., 542 F. Supp. 776, 781 (W.D. Pa. 1982).

For cases denying standing, see Boisjoly v. Morton Thiokol, Inc., 706 F. Supp. 795, 804 (N.D. Utah 1988); Thomason v. Mitsubishi Elec. Sales Am., Inc., 701 F. Supp. 1563, 1570 (N.D. Ga. 1988); Reitz v. Canon U.S.A., Inc., 695 F. Supp. 552, 554 (S.D. Fla. 1988); Winther v. DEC Int'l, Inc., 625 F. Supp. 100, 103 (D. Colo. 1985); Callahan v. Scott Paper Co., 541 F. Supp 550, 561 (E.D. Pa. 1982); Perry v. Hartz Mountain Corp., 537 F. Supp. 1387, 1390 (S.D. Ind. 1982).

18. *Compare* Gonsalves v. Kaiser Sand & Gravel Co., No. C92-3561BAC, 1993 WL 452669, at *2 (N.D. Cal. Oct. 22, 1993) (Caulfield, J.) (granting standing) *with* Vinci v. Waste Management, Inc., No. C94-1946FMS, 1994 WL 478163, at *2-*6 (N.D. Cal. Aug. 25, 1994) (Smith, J.) (denying standing).

19. For commentary urging courts to grant standing under section 4 of the Clayton Act, see Gary M. Shaw, *Retaliatorily Discharged Employees' Standing to Sue Under the Antitrust Laws,* 67 OR. L. REV. 331, 391 (1988) (arguing that allowing standing is correct under the Supreme Court's standing analysis articulated in *Associated General* and consistent with congressional intent); Matthew H. Lynch, Note, *Antitrust Standing After* Associated General Contractors: *The Issue of Employee Retaliatory Discharge,* 63 B.U. L. REV. 983, 1037 (1983) (arguing that wrongful discharge may have an anticompetitive effect in the employment market, and, if this effect were shown, a wrongfully discharged employee would have standing); John A. MacKerron III, Note, *Discharged Employees: Should They Ever Have Antitrust Standing Under Section 4 of the Clayton Act?,* 34 HASTINGS L.J. 839, 869 (1983) (arguing that courts distinguish between per se and non-per se violations when granting standing); J. Michael Naughton, Jr., Note, Ostrofe v. H.S. Crocker Co.: *Antitrust Standing Under Section 4: A Departure from the Definitional Approach,* 3 PACE L. REV. 739, 770 (1983) (concluding that the federal circuit courts should follow the Ninth Circuit analysis in *Ostrofe* and grant standing); Note, *Employee Standing Under Section 4 of the Clayton Act,* 81 MICH. L. REV. 1846, 1866 (1983) (arguing that the Supreme Court's antitrust standing doctrine and the policies behind the antitrust laws support granting standing).

For commentary urging courts to deny standing to a wrongfully discharged employee, see Rathleen Chouai, Note, *Discharged Employees and Treble Damages: The Outer Limits of "Antitrust Injury",* 44 U. PITT. L. REV. 1005, 1036 (1983) (arguing that wrongfully discharged employees lack "antitrust injury"); Laurie N. Feldman, Comment, *Employees Discharged in Retaliation for Resisting Employers' Antitrust Violations: The Need for a Federal Remedy,* 51 U. CHI. L. REV. 559, 579 (1984) (concluding that wrongfully discharged employees lack "antitrust injury" and calling for a federal remedy for such employees); Bradley G. Haas, Comment, *The Discharged Employee's Standing to Sue Under Section 4 of the*

The California counterpart to the federal antitrust laws is the Cartwright Act.[20] Although the Act is not coextensive with the federal laws,[21] California courts have generally applied interpretations of federal law when construing the Cartwright Act.[22] In the private standing context, this application is logical because the relevant private standing provisions in the Cartwright and Clayton Acts are nearly identical.[23] However, despite the similar language and the California courts' deference to federal interpretation, the "exact parameters" of antitrust standing under the Cartwright Act "have not yet been established through either court decisions or legislation."[24]

Two California appellate courts have addressed the issue whether a wrongfully discharged employee has standing under the Cartwright Act.[25] Neither court granted standing to the employee. Nevertheless, this Note argues that California courts should grant standing to wrongfully discharged employees under the Cartwright Act. Simply put, the analysis in the two existing decisions is flawed. The courts failed to recognize (1) the distinct legislative history of the Cartwright Act, (2) relevant California case law, and (3) compelling policy reasons to grant standing. The Cartwright Act's history and subsequent amendments indicate the California Legislature's desire to expand private antitrust standing beyond the confines of federal doctrine.[26] Furthermore, Cartwright Act case law recognizes this desire and exceeds the boundaries of federal analysis. More specifically, granting standing to wrongfully discharged employees is consistent with previous Cartwright Act decisions. Additionally, wrongfully discharged employees offer unique enforcement opportunities without the

Clayton Act, 54 U. CIN. L. REV. 191, 212 (1985) (concluding that a wrongfully discharged employee has not suffered "antitrust injury," as described *infra* Part II.A.2); Stephen J. Horvath III, Note, *Standing of the Terminated Employee Under Section 4 of the Clayton Act*, 25 WM. & MARY L. REV. 341, 371 (1983) (arguing that a wrongfully discharged employee lacks "antitrust injury" and that granting standing is not consistent with the remedial and deterrent purposes of the antitrust laws); James A. Montee, Note, *Antitrust Suits by Discharged Employees*, 49 MO. L. REV. 135, 146 (1984) (approving of the Seventh Circuit's conclusion that a wrongfully discharged employee lacks "antitrust injury").

20. CAL. BUS. & PROF. CODE §§ 16700-16770 (West 1987 & Supp. 1995).

21. *See* SECTION OF ANTITRUST LAW, A.B.A., 6-2 to 6-4 (1990) [hereinafter STATE ANTITRUST PRACTICE AND STATUTES] (stating that the Cartwright Act is closely analogous to but not coextensive with section 1 of the Sherman Act and sections 3 and 4 of the Clayton Act).

22. *See, e.g.*, Marin County Bd. of Realtors, Inc. v. Palsson, 549 P.2d 833, 835 (Cal. 1976) (stating that federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act).

23. *See supra* note 8.

24. Cellular Plus, Inc. v. Superior Court, 18 Cal. Rptr. 2d 308, 313 (Ct. App. 1993).

25. *See infra* Part I.

26. *See infra* Part III.A.2.

problems associated with other private plaintiffs.[27] The complexity and expense of antitrust litigation, coupled with the less complex tort of wrongful discharge, act to filter out weak plaintiffs and ensure that the grant of standing does not produce excessive litigation. Therefore, antitrust standing for wrongfully discharged employees would greatly enhance the effectiveness of California's antitrust enforcement efforts.[28]

Part I gives a brief history of wrongfully discharged employee actions under the Cartwright Act. Because California courts rely heavily on the interpretation of analogous federal antitrust statutes,[29] Part II.A describes the development of federal antitrust standing doctrine and the federal requirement of "antitrust injury." Part II.B discusses the application of the federal antitrust standing doctrine to the case of a wrongfully discharged employee. Part III then examines Cartwright Act standing doctrine and explores the reasons for differences between the state and federal doctrines. Part IV concludes this Note by examining the analytical and policy reasons for granting standing to a wrongfully discharged employee under the Cartwright Act and by critiquing the California decisions in this light.

I. History of Wrongfully Discharged Employee Suits Under the Cartwright Act

Two California appellate courts have confronted the issue of whether a wrongfully discharged employee has standing under the Cartwright Act. The first consideration occurred in the 1979 case of *Tameny v. Atlantic Richfield Co.*,[30] in which Gordon Tameny claimed that Atlantic Richfield discharged him for refusal to participate in a violation of the Cartwright Act. Tameny advanced five causes of action: three tort actions, one breach of contract action, and an action

27. *See infra* Part IV.

28. This enhancement is especially true because, unlike other state antitrust laws, the application of the Cartwright Act is not limited to intrastate activity. Thus, wrongfully discharged employees may expose antitrust violations of the most complex and interstate character. *See* Janet L. McDavid, *The California Experience: A Hole in the* Illinois Brick *Wall?*, 1 ANTITRUST 16, 16 (1987) (noting that application of the Cartwright Act is not limited to intrastate commerce and citing a case in which a single indirect sale to a California purchaser gave a California court jurisdiction over the case).

29. *See supra* note 22.

30. 152 Cal. Rptr. 52 (Ct. App. 1979). Tameny alleged that he refused to cooperate with his employer's allegedly illegal attempt to persuade Atlantic Richfield (ARCO) retailers to reduce their gasoline prices. *Id.* at 53. This vertical price restraint would be illegal as a conspiracy in restraint of trade. *See* G.H.I.I. v. MTS, Inc., 195 Cal. Rptr. 211, 217 (Ct. App. 1983) ("Two forms of conspiracy may be used to establish a violation of the [Cartwright Act]: a *horizontal* restraint, consisting of a collaboration among competitors; or a *vertical* restraint, based upon an agreement between business entities occupying different levels of the marketing chain.") (citations omitted).

under the Cartwright Act.[31] The trial court sustained a demurrer to all but the contract cause of action, which the plaintiff had voluntarily dismissed.[32] With little analysis, the California Court of Appeal for the Second District held that an employee discharged for refusal to participate in antitrust violations does not have standing to sue under the Cartwright Act.[33] The court also affirmed the trial court judgment sustaining the demurrer to the tort theories.[34]

The California Supreme Court reviewed the case and held that an employee who is discharged for refusal to participate in illegal conduct may bring a tort action for wrongful discharge.[35] Thus, the tort of wrongful discharge was born in California.[36] The plaintiff, however, did not appeal the appellate court's denial of his Cartwright Act claim.[37]

Sixteen years later, in the 1995 case of *Vinci v. Waste Management, Inc.*,[38] the California Court of Appeal for the First District also confronted this standing issue. The *Vinci* court failed to seize the opportunity to utilize the efficient enforcement presented by wrongfully discharged employees and denied standing.[39] Part IV.E argues in de-

31. *Tameny*, 152 Cal. Rptr. at 53. The three tort actions were (1) wrongful discharge, (2) breach of the covenant of good faith and fair dealing, and (3) intentional interference with contractual relations. *Id.* The contract action was based on the plaintiff's employment contract. *Id.*

32. *Id.* at 53. Since the plaintiff dismissed the contract claim, the appellate court was concerned only with the other four causes of action. *Id.*

33. *Id.* at 55-56. The court stated that "there is no adequate correlation for purposes of standing to sue under the Cartwright Act between the attempt to illegally fix the price of gasoline and the discharge of an employee who refuses to cooperate in that activity." *Id.* at 55. The court held that a wrongfully discharged employee is not within the "target area" of the antitrust violation. *Id.* at 56. The "target area" test was used by the Ninth Circuit but was later rejected by the United States Supreme Court. *See* R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139, 145-46 (9th Cir. 1989) (en banc) (noting that although the Ninth Circuit had previously used the "target area test," that test was explicitly rejected by the Supreme Court in *Associated General*).

34. *Tameny*, 152 Cal. Rptr. at 56.

35. Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1332-35 (Cal. 1980).

36. *See, e.g.*, Janet Gilligan Abaray, Note, *The Development of Exceptions to At-Will Employment: A Review of the Case Law from Management's Viewpoint*, 51 U. CIN. L. REV. 616, 619 (1982) (noting that *Tameny* was the first California case to allow both tort and contract claims in a wrongful discharge case); Laila Boberg Soares, Note, Tameny v. Atlantic Richfield Co.: *Wrongful Discharge, a New Tort to Protect At-Will Employees*, 8 W. ST. U. L. REV. 91, 91 (1980) (noting that, in *Tameny*, the California Supreme Court created the unprecedented tort of wrongful discharge).

Because the Court held that the plaintiff stated a cause of action for wrongful discharge, it was unnecessary to determine whether the other tort theories were available. *Tameny*, 610 P.2d at 1337 n.12.

37. *Tameny*, 610 P.2d at 1332 n.5 (stating that, although amicus filed a brief discussing the Cartwright claim, the plaintiff confined his objections to the tort causes of action).

38. 43 Cal. Rptr. 2d 337, 338 (Ct. App. 1995).

39. *Id.* at 339-40.

tail that *Vinci* was wrongly decided because the court's decision was driven by federal antitrust standing concepts[40] and failed to recognize that (1) Cartwright Act standing is broader and deeper than federal antitrust standing; (2) the history of the Cartwright Act, subsequent legislative amendments, and California case law support a grant of standing to such an employee; and (3) the verbal formulation of antitrust standing concepts should not become a trap that excludes efficient antitrust enforcers when the very purpose of these standing concepts is to ensure efficient private enforcement.

II. The Federal Antitrust Standing Analysis

A. Standing Requirements Under Section 4 of the Clayton Act

As indicated earlier, a literal reading of section 4 of the Clayton Act would encompass potential plaintiffs far removed from and tangential to the antitrust violation.[41] Because of the almost unlimited number of potential plaintiffs, the United States Supreme Court has attempted to define a manageable antitrust standing requirement that is consistent with the policy behind the antitrust laws.[42] Antitrust standing doctrine looks to both the relation between the parties and the type of injury claimed.

(1) The Relation Between the Parties: Directness of Injury

Illinois Brick Co. v. Illinois[43] was one in a series of Supreme Court cases, beginning in 1977, addressing the issue of standing under section 4.[44] The State of Illinois and 700 local governmental agencies brought suit alleging that a group of concrete block manufacturers had conspired to fix prices in violation of section 1 of the Sherman Act.[45] The concrete blocks passed through two separate levels of dis-

40. *Id.; see* discussion *infra* Part IV.E. Part II explains the federal antitrust standing doctrine cited by the *Vinci* court.

41. *See supra* note 10.

42. *See* Robert P. Taylor, *Antitrust Standing: Its Growing—Or More Accurately Its Shrinking—Dimensions*, 55 ANTITRUST L.J. 515, 517 (1986) (stating that "[t]he body of law that we call 'antitrust standing' developed historically because courts have never been willing to apply Section 4 of the Clayton Act literally").

43. 431 U.S. 720 (1977).

44. *See* Roger D. Blair & Jeffrey L. Harrison, *Rethinking Antitrust Injury*, 42 VAND. L. REV. 1539, 1543-44 (1989) ("[T]he modern era of antitrust standing . . . began in 1977 . . . .").

45. *Illinois Brick*, 431 U.S. at 726-27. Section 1 of the Sherman Act prohibits conspiracies in restraint of trade. 15 U.S.C. § 1 (1994). The plaintiffs alleged a horizontal price restraint, which is illegal per se. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223-24 (1940) (establishing that tampering with price structures is illegal per se under the Sherman Act).

tribution before being purchased by the governmental agencies.[46] First, the blocks were purchased directly from the manufacturers by masonry contractors who used the blocks to build structures. These structures were then incorporated into buildings built by general contractors.[47] The completed buildings were in turn sold to the municipalities.[48] The plaintiff government agencies were therefore indirect purchasers.

Despite the Court's recognition of "the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws,"[49] the Court denied standing for indirect purchasers. The Court articulated three reasons for this denial.[50] First, the Court feared that allowing indirect purchaser standing would lead to multiple liability and duplicative recoveries.[51] Second, the Court did not want to impede antitrust enforcement with "massive evidence and complicated theories" required for the complex apportionment of overcharges in such suits.[52] Finally, the Court stated that direct purchasers would better serve the legislative purposes behind private enforcement because such purchasers would not deplete "the overall recovery in litigation over pass-on issues."[53]

To ensure that California consumers continue to enjoy meaningful remedies under the Cartwright Act, the California Legislature repudiated the reasoning and rule of *Illinois Brick.* In 1978, the Legislature passed an amendment to clarify that those indirectly injured by an antitrust violation do have standing under the Cartwright Act.[54]

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46. *Illinois Brick,* 431 U.S. at 726.

47. *Id.*

48. *Id.*

49. *Id.* at 746 (quoting Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972)) (internal quotation omitted).

50. Arguably, another reason was consistency with the Court's prior decision in Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968). In *Hanover Shoe,* a manufacturer claimed that its customer was not able to show injury because the customer was able to "pass on" to its customer the higher prices caused by the manufacturer's antitrust violation. *Id.* at 487-88. The Court rejected the defense that indirect rather than direct purchasers were the ones injured. *Id.* at 494.

The *Illinois Brick* Court characterized *Hanover Shoe*'s factual pattern as the offensive use of the pass-on theory. *Illinois Brick,* 431 U.S. at 726. The Court decided that the use of the pass-on theory "must apply equally to plaintiffs and defendants." *Id.* at 728.

51. *Illinois Brick,* 431 U.S. at 730-31. The Court reasoned that a seller would be liable to direct purchasers and any intermediate purchasers. *Id.*

52. *Id.* at 740-41 (quoting *Hanover Shoe,* 392 U.S. at 493).

53. *Id.* at 746-47.

54. Act of Aug. 25, 1978, ch. 536, sec. 1, § 16750(a), 1978 Cal. Stat. 1693, 1693 (codified as CAL. BUS. & PROF. CODE § 16750(a)); *see* discussion *infra* Part III.A.2.b. *See generally* Blane A. Smith, Note, *The California Legislature Steers the Antitrust Cart Right Off the* Illinois Brick *Road,* 11 PAC. L.J. 121 (1979) (analyzing the legislative response to *Illinois*

(2) Antitrust Injury

Commentators and courts who would deny standing to a wrongfully discharged employee invariably contend that such an employee has not sustained "antitrust injury."[55] Antitrust injury is an element of the antitrust standing requirement that has been judicially developed to filter through the vast number of potential plaintiffs and accept only efficient private enforcers. The Supreme Court has defined antitrust injury as "the type [of injury] that the antitrust statute was intended to forestall."[56] Despite the apparently clear and simple language of this definition, courts have had difficulty applying the standard.[57] The precise definition is ambiguous at best. Thus, the only

Brick and suggesting methods of handling the procedural difficulties faced by courts in such suits).

55. Antitrust injury was first articulated as a requirement for a private treble damage remedy by the United States Supreme Court. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). The Court stated that a treble damage plaintiff "must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust injury,* which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id.* at 489 (emphasis added).

Although it is not entirely clear whether antitrust injury is an element of antitrust standing or a separate concept, I will treat antitrust injury as an element of antitrust standing. *See* PHILIP C. JONES, LITIGATING PRIVATE ANTITRUST ACTIONS § 19.02 (1988) ("[A]ntitrust injury and standing will be regarded as two related subcategories of the issue of proper parties to sue."); Blair & Harrison, *supra* note 44, at 1540 (explaining that standing requirements limit the array of potential plaintiffs, but antitrust injury limits the type of compensable harm; however, together they form a generalized standing requirement).

For commentary concluding that lack of antitrust injury precludes a wrongfully discharged employee from bringing a suit under section 4 of the Clayton Act, see *supra* note 19.

Federal cases that deny standing to wrongfully discharged employees do so because of a lack of antitrust injury. *See, e.g., In re* Industrial Gas Antitrust Litig., 681 F.2d 514, 519 (7th Cir. 1982), *cert. denied,* 460 U.S. 1016 (1983) (concluding that a wrongfully discharged employee does not suffer antitrust injury because he was not the target of the anticompetitive practices); Thomason v. Mitsubishi Elec. Sales Am., Inc., 701 F. Supp. 1563, 1570 (N.D. Ga. 1988) (holding that a wrongfully discharged employee's injury fails the "target area" test for antitrust injury).

56. Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 540 (1983).

57. *See, e.g.,* Terry Calvani, *The Mushrooming Brunswick Defense: Injury to Competition, Not to Plaintiff,* 50 ANTITRUST L.J. 319, 328-33 (1981) (cataloguing the various readings of the *Brunswick* decision). Calvani showed the difficulty in the language:

> In our attempt to discern the meaning of *Brunswick,* we might apply the plain meaning rule and take the Supreme Court at its word: "Plaintiffs must prove *antitrust injury* . . . of the type the antitrust laws were intended to prevent. . . ." Thus, the question becomes what type of injury was it that these laws were intended to prevent. I suggest that this line of inquiry has historically been errant and nonproductive. It assumes there to be a consistent rationale underlying the federal antitrust laws. The bane of antitrust law is that there has been no accepted and internally consistent underlying public policy.

way to understand antitrust injury and its relation to antitrust standing requires a review of the Supreme Court decisions in this area.

(a) *Brunswick*

The seminal case for antitrust injury and modern antitrust standing analysis is *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[58] In that case, Brunswick had sold bowling equipment on credit to certain bowling centers.[59] When the bowling industry went into decline in the 1960s, Brunswick began to acquire defaulting bowling centers.[60] The plaintiff was a competitor of one of the acquired centers and complained that the acquisition violated section 7 of the Clayton Act.[61] Essentially, the plaintiff complained that if Brunswick had not acquired its competitor, that competitor would have failed, and therefore Brunswick was "denying [plaintiff] an anticipated increase in market shares."[62]

Brunswick did not challenge the claim that the acquisition was an illegal merger, but rather it questioned whether the plaintiff should have antitrust standing.[63] The Clayton Act was designed to prevent mergers that may reduce competition.[64] Here, the plaintiff complained that it was injured because competition was *not* reduced. Although the plaintiff received lower profits because of the unlawful acquisition, it was not injured by "that which made the acquisitions unlawful."[65] To hold otherwise "divorces antitrust recovery from the purposes of the antitrust laws."[66] The Court therefore required "*anti-*

> The language, "were intended to prevent," seems to imply that Congress had something in mind[, but] the historical record fails to adduce such a rationale.

Id. at 325 (footnotes omitted).

58. 429 U.S. 477 (1977).

59. *Id.* at 479. Brunswick sold lanes, automatic pinsetters, and ancillary equipment. *Id.*

60. *Id.* at 479-80. Although Brunswick had a secured interest in the equipment, there was little demand for the repossessed bowling center equipment. *Id.* at 479. To cut its losses, Brunswick acquired and operated the defaulting centers to generate a positive cash flow. *Id.* at 479-80.

61. *Id.* at 480-81. Section 7 prohibits mergers whose effects "may be substantially to lessen competition." 15 U.S.C. § 18 (1994). Pueblo asserted the "market entrenchment" theory of illegal mergers. Under this theory, a "giant" firm enters a market dominated by "pygmies" and reduces horizontal competition because the giant's resources allow it to make investments in equipment and sustain long price wars. *Brunswick*, 429 U.S. at 482; *see* 11 EARL W. KINTNER, FEDERAL ANTITRUST LAW § 36.30 (1984).

62. *Brunswick*, 429 U.S. at 484.

63. *Id.* The appellate court ruled that there was sufficient evidence to support the jury's finding of an illegal acquisition. *Id.* at 482-83.

64. 15 U.S.C. § 18 (1994).

65. *Brunswick*, 429 U.S. at 488.

66. *Id.* at 487.

trust injury, which is to say injury of the type the antitrust laws were intended to prevent."[67]

(b) *McCready*

The Court again addressed the antitrust standing requirements in *Blue Shield v. McCready*.[68] Carol McCready subscribed to a group health plan that reimbursed for treatment by psychotherapists, but not for treatment by psychologists unless supervised by a physician.[69] McCready was treated by an unsupervised clinical psychologist, and Blue Shield rejected her claims.[70] McCready sued for damages, alleging a conspiracy between the insurance company and psychiatrists to boycott psychologists in violation of the Sherman Act.[71]

In addressing the issue of whether McCready had standing under the Clayton Act's section 4, the Court looked at two questions: (1) whether the physical and economic relation between the violation and the harm was close, and (2) whether the injury was of the type Congress was likely to have been concerned about when enacting section 4.[72] Considering the first factor, the Court maintained that McCready's injury was sufficiently connected because denying reimbursement to subscribers was the "very means" of, and a "necessary step" in, Blue Shield's illegal boycott.[73] Because the alleged injury was "so integral an aspect of the conspiracy," the Court found "no question" that the injury was of the type likely to be caused by the violation.[74]

The Court also found that McCready's injury was of the type Congress was likely to be concerned with—antitrust injury. The Court found that McCready's injury was "inextricably intertwined with the injury the conspirators sought to inflict on psychologists."[75] McCready's injury thus "'flow[ed] from that which makes defendants' acts unlawful' . . . and [fell] squarely within the area of congressional concern."[76] Although the injury did not reflect the anticompetitive effect of the alleged violation, the Court found that antitrust injury is

67. *Id.* at 489.
68. 457 U.S. 465 (1982).
69. *Id.* at 468.
70. *Id.*
71. *Id.* at 468-70. Section 1 of the Sherman Act is found in 15 U.S.C. § 1 (1994).
72. *Blue Shield,* 457 U.S. at 478.
73. *Id.* at 479.
74. *Id.*
75. *Id.* at 484.
76. *Id.* According to the majority, the dissent was unwilling to find the injuries significant under the antitrust laws because McCready was a consumer. However, McCready's participation in the market for psychotherapeutic services was enough for the majority to implicate the antitrust laws. *Id.* at 484 n.21.

not limited to such effects.[77] Satisfied that McCready met the two prongs of its inquiry, the Court allowed McCready to maintain an action under section 4.

(c) *Associated General*

The Supreme Court further refined antitrust standing analysis in *Associated General Contractors v. California State Council of Carpenters.*[78] The plaintiff unions alleged that a multiemployer association coerced third parties and association members into utilizing nonunion contractors and subcontractors.[79] This coercion allegedly adversely affected unionized firms and therefore restrained the activities of the unions in violation of the Sherman Act.[80]

The plaintiffs[81] and defendants[82] were parties to collective bargaining agreements governing the terms and conditions of employment in the California construction industry for more than twenty-five years.[83] In an alleged effort to weaken the collective bargaining relationship between the parties, the defendants allegedly conspired to (1) induce nonmembers of the association to refuse to enter into collective bargaining agreements with the plaintiffs; (2) coerce land owners to hire nonunion contractors and subcontractors; and (3) coerce association members to use nonunion subcontractors.[84] The unions claimed that this conspiracy violated the Sherman Act by restraining the trade of certain contractors and thus the unions.[85]

In deciding whether the unions, as opposed to the individual contractors, could maintain such an action, the *Associated General* Court developed five factors for the antitrust standing requirement.[86] The

77. *Id.* at 482. The Court agreed that *Brunswick* embraced the principle that antitrust injury should be linked to the pro-competitive policy of the antitrust laws. However, the Court stated that "*Brunswick* is not so limiting" and that injury from the anticompetitive effect of a violation is not the only type of injury remediable under section 4 of the Clayton Act. *Id.* at 482-83.

78. 459 U.S. 519 (1983).

79. *Id.* at 520-23.

80. *Id.* at 523 n.4. The Sherman Act forbids conspiracies in restraint of trade. 15 U.S.C. § 1 (1994).

81. The plaintiffs represented numerous affiliated local unions and district councils. *Associated General,* 459 U.S. at 521. These unions represented more than 50,000 individuals employed by the defendants in the carpentry, drywall, piledriving, and related industries. *Id.*

82. The defendants were a multiemployer membership corporation and its individual building and construction contractor members. *Id.*

83. *Id.*

84. *Id.* at 522-23.

85. *Id.* at 523. The plaintiffs claimed twenty-five million dollars in damages. *Id.* at 524.

86. *Id.* at 540-44. The Court first noted that the reach of section 4 of the Clayton Act should be construed in light of common law antecedents to the language originally enacted

Court generated these factors based on an analysis of the Sherman Act's legislative history, an evaluation of the plaintiff's harm and the alleged wrongdoing, and the relationship between the harm and alleged wrongdoing.[87] The Court likened the inquiry to the struggle of common-law judges to define proximate cause and noted that, because of the infinite variety of claims, no black-letter rule could be satisfactory.[88] Instead the Court opted to identify the factors bearing on antitrust standing.[89] Considering these factors, the Court held that the unions did not have standing under section 4.[90]

First, the Court considered antitrust injury.[91] The Court found that the unions had not suffered antitrust injury;[92] unlike the plaintiff in *McCready,* the unions were neither participants in the restrained market nor direct victims of coercion.[93] The Court also noted that the broad labor exemption to the antitrust laws and the separate body of federal law intended to protect and encourage labor unions indicated that a union, especially in disputes with employers, is usually not part of the class that the Sherman Act was designed to protect.[94] However, because the unions were not direct victims, the Court reserved the question whether a *direct victim* suffering an injury unrelated to antitrust policies could have standing under section 4 of the Clayton

as section 7 of the Sherman Act. *Id.* The Court reasoned that frequent references to common law principles in the legislative history of section 7 of the Sherman Act implies that Congress assumed those principles would apply to a treble damage claim. *Id.* at 533.

87. *Id.* at 535. These factors were required in common law damages litigation at the time of the adoption of the Sherman Act. *Id.*

88. *Id.* at 535-36. The Court quoted Judge Andrews's dissent in Palsgraf v. Long Island R.R., 162 N.E. 99, 103 (N.Y. 1928), listing the factors for proximate cause as convenience, public policy, and a rough sense of justice. *Associated General,* 459 U.S. at 536 n.34.

89. *Associated General,* 459 U.S. at 537.

90. *Id.* at 545-46. In so holding, the Court reversed the Ninth Circuit decision granting the unions standing. *See* California State Council of Carpenters v. Associated Gen. Contractors, 648 F.2d 527, 538 (9th Cir. 1980). The Ninth Circuit had reasoned that the unions were in the "target area" of the antitrust violation—"that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *Id.* at 537-38 (citations omitted). The Supreme Court denounced this test and insisted that "courts should analyze each situation in light of the factors set forth in [this] text." *Associated General,* 459 U.S. at 536 n.33. Despite the Supreme Court's language, some courts persist in using the "target area" test. *See* PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 334.1b & n.26 (Supp. 1993) (citing circuit court decisions using the test after *Associated General*).

91. *Associated General,* 459 U.S. at 540 (citing *Brunswick* for the proposition that the injury must be "of the type that the antitrust statute was intended to forestall").

92. *Id.* The Court noted that the unions were not competitors or consumers in the restrained market and that it was not clear whether the unions would benefit from enhanced or restrained competition in that market. *Id.* at 539.

93. *Associated General,* 459 U.S. at 541 n.44.

94. *Id.* at 539-40. The Court found that, in this case, the unions' labor-market interests predominated; thus, the *Brunswick* test was not satisfied. *Id.* at 540.

Act.[95] Despite finding no antitrust injury, the Court continued to consider the other standing factors.[96]

Second, the Court considered the related question of the directness or indirectness of the plaintiff's injury.[97] The chain of causation between the unions' injury and the alleged conspiratorial conduct contained "somewhat vaguely defined links."[98] Third, other potential plaintiffs were more directly injured than the unions. The existence of these potential plaintiffs lessened the enforcement value of the unions—some other victim could "vindicate the public interest in antitrust enforcement."[99]

Fourth, the indirectness of the injury added to the speculative nature of the damages.[100] This indirectness also implicated the final factor—the duplicative recovery and complexity concerns raised in *Illinois Brick*.[101] In conclusion, the Court held that the combination of these five factors precluded a grant of standing to the unions.

(d) *USA Petroleum*

Although the Court addressed the concept of antitrust injury in other cases,[102] the most in-depth analysis appeared in the 1990 case of *Atlantic Richfield Co. v. USA Petroleum Co.*[103] USA Petroleum

95. *Id.* at 541. This concept becomes important in the case of a wrongfully discharged employee if a court decides that termination from employment is an injury unrelated to the purposes of the antitrust laws. *See* Ostrofe v. H.S. Crocker Co., 740 F.2d 739, 744 (9th Cir. 1984) (reasoning that this reservation allows a broad reading of antitrust injury in the case of a wrongfully discharged employee).

96. Although the Court's continued analysis may seem to indicate that antitrust injury is not a requirement for standing under section 4, the Court later confirmed that antitrust injury is required. Cargill, Inc. v. Monfort, Inc., 479 U.S. 104, 110 n.5 (1986) ("A showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4 . . . .").

97. *Associated General*, 459 U.S. at 540-41.

98. *Id.* at 540. Allegedly, the association's conspiracy diverted business from certain union contractors. *Id.* The unions maintained that they suffered "unspecified injuries in [their] 'business activities.'" *Id.* at 541. The Court noted that this harm was only an indirect result of the alleged conduct. *Id.* at 541 & n.46.

99. *Id.* at 541-42. The Court noted that the existence of direct victims—the firms or the coerced—whose self-interested private suits would vindicate the public interest in enforcement diminishes the need for the more indirect victims—the unions—to act as private attorneys general. *Id.* at 542. The Court also found that the existence of more direct victims who do not assert any claims themselves casts doubt upon whether any "victims" were harmed at all. *Id.* at 542 n.47.

100. *Id.* at 542-43. Also, independent factors could have contributed to the harm alleged, thereby increasing the uncertainty of damages. *Id.* at 542.

101. *Id.* at 543-45. Specifically, the Court referred to the risk of duplicative recoveries and the danger of complex apportionment of damages. *Id.* at 543-44.

102. *See, e.g.*, Cargill Inc. v. Monfort, Inc., 479 U.S. 104, 113 (1986) (requiring antitrust injury for injunctive relief under section 16 of the Clayton Act).

103. 495 U.S. 328 (1990).

(USA), an independent gasoline retailer, competed with Atlantic Richfield's (ARCO's) retail outlets.[104] USA alleged that ARCO violated section 1 of the Sherman Act by instituting a vertical maximum-price-fixing agreement—ARCO agreed with its dealers on the maximum price at which the dealers could sell gasoline—that eliminated competition between ARCO dealers and drove independent retail gasoline marketers out of business.[105] The district court granted summary judgment, holding that a competitor cannot show antitrust injury without showing that the prices are predatory.[106] The Ninth Circuit reversed.[107]

The Supreme Court held that USA did not suffer antitrust injury.[108] In effect, USA complained that the vertical maximum-price restraints created ARCO gasoline prices lower than USA could match.[109] USA thus objected to being underpriced by a competitor.[110] Price cutting, however, is central to competition.[111] Although ARCO may have violated the antitrust laws, USA did not suffer antitrust injury because it was not "adversely affected by an *anticompetitive* aspect of the defendant's conduct."[112] Additionally, for a number of

104. *Id.* at 331. USA Petroleum purchased gasoline from major petroleum companies for resale under its own brand name. *Id.*

105. *Id.* at 331-32. Vertical maximum price restraints have been deemed illegal per se under the Sherman Act. *See* Albrecht v. Herald Co., 390 U.S. 145, 152-53 (1968).

106. *USA Petroleum,* 495 U.S. at 333. The district court found that even if USA could establish a conspiracy to restrain prices, USA could not show antitrust injury unless those prices were predatory. *Id.* Predatory pricing, a violation of section 2 of the Sherman Act, has been defined as setting prices below an appropriate level of cost (e.g., average variable cost) coupled with a dangerous probability of recouping losses from such pricing (e.g., after driving out competition, a predatory pricer could raise its prices to monopoly levels). *See* Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2587-88 (1993).

107. *USA Petroleum,* 495 U.S. at 333. The Ninth Circuit reasoned that USA's losses resulted from a disruption in the market caused by ARCO's antitrust violation, and, therefore, USA had suffered antitrust injury. *Id.* at 333-34.

108. *Id.* at 335.

109. The Court noted that the reasons why vertical maximum price restraints are unlawful—because setting prices too low could prevent a small dealer from offering services desired by customers, thereby channeling distribution through a few large dealers—would actually *benefit* an interbrand competitor like USA. *Id.* at 336-37.

110. *Id.* at 338 (stating that a firm cannot complain about harm from nonpredatory price competition).

111. *Id.* at 338 ("'[C]utting prices in order to increase business often is the very essence of competition.'" (quoting Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986))).

112. *USA Petroleum,* 495 U.S. at 339. USA argued that it should not be required to show predatory pricing because ARCO violated section 1, not section 2, of the Sherman Act. *Id.* at 338. The Court rejected this argument, holding that although the price restraint was illegal, it did not cause a competitor antitrust injury unless there was predatory pricing. *Id.* at 339.

The Court also rejected USA's contention that no antitrust injury need be shown when there is a per se violation of the Sherman Act. *Id.* at 341. The purpose of the anti-

reasons, the Court saw little "need to encourage private enforcement by competitors of the rule against vertical, maximum price" restraints.[113]

B. Application of Federal Standing Requirements to the Case of a Wrongfully Discharged Employee

The Ninth and Seventh Circuits are the only federal appellate courts that have addressed the issue whether a wrongfully discharged employee has standing under Section 4 of the Clayton Act.[114] The two courts came to opposite conclusions. Both courts rendered their decisions shortly before *Associated General,* and both cases were petitioned for certiorari. However, the Supreme Court granted certiorari only to the Ninth Circuit decision and remanded that case to consider whether *Associated General* changed the outcome.[115] On remand, the Ninth Circuit adhered to its original opinion.[116] It is unclear how the more recent case of *USA Petroleum* would affect these decisions.[117]

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trust injury requirement is to ensure that the plaintiff's harm corresponds to the rationale for finding a violation of the antitrust laws. *Id.* at 442.

113. *Id.* at 345. Consumers and dealers are injured by vertical maximum-price restraints and could bring suit themselves. *Id.* Because consumers and dealers are more directly victimized by vertical maximum-price constraints, there is less of a need to allow competitors to act as private attorneys general. *Id.* Additionally, a competitor's injury is not "inextricably intertwined" with the injury to dealers. *Id.*

Furthermore, a competitor would be motivated to sue only when a vertical maximum-price restraint promoted interbrand competition, that is, when the restraint had procompetitive effects. *Id.* A competitor suit, thus, would not protect the rights of dealers and consumers. *Id.* at 345-46.

114. Ostrofe v. H.S. Crocker Co., 670 F.2d 1378, 1379-80 (9th Cir. 1982) [hereinafter *Ostrofe I*] (allowing standing), *vacated,* 460 U.S. 1007 (1983), *reinstated on remand,* 740 F.2d 739 (9th Cir. 1984), *cert. dismissed,* 469 U.S. 1200 (1985); *In re* Industrial Gas Antitrust Litig. (Bichan v. Chemetron Corp.), 681 F.2d 514, 515 (7th Cir. 1982), *cert. denied,* 460 U.S. 1016 (1983). The Third Circuit addressed the closely analogous case of an independent broker being terminated for refusal to participate in antitrust violations and denied standing. Gregory Mktg. Corp. v. Wakefern Food Corp., 787 F.2d 92, 92 (3d Cir. 1986), *cert. denied,* 479 U.S. 821 (1986). However, an independent broker does not offer the same enforcement possibilities as a wrongfully discharged employee because such a broker is not likely to possess the critical inside information that a wrongfully discharged employee would have.

115. H.S. Crocker Co. v. Ostrofe, 460 U.S. 1007 (1983) (citing Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983)).

116. Ostrofe v. H.S. Crocker Co., 740 F.2d 739 (9th Cir. 1984) [hereinafter *Ostrofe II*], *cert. dismissed,* 469 U.S. 1200 (1985).

117. Whether a wrongfully discharged employee suffers injury from an "anticompetitive aspect" of the defendant's conduct and whether this definition precludes others is open to debate.

(1) Ninth Circuit—Ostrofe

Frank Ostrofe, a marketing director of H.S. Crocker Company, alleged that his employer forced him to resign from his position and that he was boycotted from further employment in the lithograph label industry because he refused to participate in his employer's violation of the Sherman Act.[118] On appeal, the Ninth Circuit faced the question of whether Ostrofe had standing under section 4 of the Clayton Act. The court held that Ostrofe had standing as a victim (1) of a boycott in the personal services market, (2) of a boycott to effectuate a conspiracy, and (3) of a unilateral discharge by a conspirator in furtherance of the conspiracy.[119] The Supreme Court vacated the judgment and remanded in light of *Associated General.*[120] After reexamining Ostrofe's standing, the Ninth Circuit concluded that its original decision remained valid.[121]

In the final opinion, the court relied on the *McCready* rationale to decide that discharging an employee in furtherance of a conspiracy gives that employee standing under section 4.[122] The court cited *McCready* for the proposition that, regardless of the fact that the injuries do not result from the anticompetitive effect of antitrust violations, persons whose injuries are a "necessary step" and the "means employed" to effectuate an antitrust violation have standing under section 4.[123] Reasoning that Ostrofe's participation was essential to the conspiracy, the court found that his discharge was a necessary means to achieve the illegal ends and an inextricable part of the anticompetitive scheme.[124] Despite not being a competitor or consumer in the labels market, Ostrofe sustained antitrust injury and had standing under section 4.[125]

118. *Ostrofe I,* 670 F.2d at 1380. Ostrofe alleged that Crocker conspired with other lithograph manufacturers of paper lithograph labels to rig bids, fix prices, and allocate markets. *Id.*

119. *Ostrofe II,* 740 F.2d at 740 (summarizing the holding of *Ostrofe I,* 670 F.2d at 1379-80).

120. H.S. Crocker Co. v. Ostrofe, 460 U.S. 1007 (1983).

121. *Ostrofe II,* 740 F.2d at 740-41.

122. *Id.* at 745-46. This Note does not discuss the rationale behind granting a discharged employee standing to challenge an alleged boycott.

123. *Id.* at 745.

124. *Id.* at 745-46. Ostrofe sold labels below the prices that were allegedly agreed upon by the competitors. These sales threatened the conspiracy because other conspirators had less incentive to adhere to the agreement.

125. *Id.* at 746. The court saw Ostrofe's discharge as analogous to the Supreme Court's hypothetical in *McCready. Id.* at 745-46. The Supreme Court had hypothesized that if psychiatrists had boycotted a bank, forcing it to cease lending to psychologists, the bank would have standing under section 4 even though the anticompetitive effects were in the psychologist market. Blue Shield v. McCready, 457 U.S. 465, 484 n.21 (1982). Similarly, Ostrofe's discharge furthered the anticompetitive effects in the labels market. Like the bank, Ostrofe should have standing.

The Ninth Circuit also analyzed Ostrofe's standing under the assumption that their reading of *McCready* was too broad; again, the court found antitrust injury.[126] The court noted that in *Associated General,* the Supreme Court had reserved the question of whether a direct victim of an antitrust violation who suffers an injury unrelated to antitrust policies can have standing under section 4.[127] Thus, the *Ostrofe* court allowed standing based on a number of policy factors: (1) the public interest in effective antitrust enforcement; (2) the desirability of encouraging exposure of antitrust violations; (3) the fact that the injury is intentional and caused by the violation; and (4) the avoidance of *Illinois Brick* problems, as the injury is not remote.[128] The Supreme Court declined further review of the case.[129]

(2) Seventh Circuit—Bichan

Robert Bichan alleged that he was terminated from his position as president of Chemtron's Industrial Gas Division and blacklisted by the industrial gas industry for his refusal to participate in a horizontal price-fixing conspiracy.[130] Although aware of the Ninth Circuit's holding in *Ostrofe,* the Seventh Circuit, in *In re Industrial Gas Litigation* (*Bichan v. Chemtron Corp.*), denied standing under section 4 of the Clayton Act.[131]

The Seventh Circuit held that a wrongfully discharged employee has not suffered antitrust injury. Recognizing that courts had developed several tests for antitrust injury,[132] the court applied the target area test to Bichan's situation.[133] Because his injury was not in "the area of the economy endangered by the anticompetitive scheme"—the industrial gas market—Bichan did not suffer antitrust injury.[134]

126. *Ostrofe II,* 740 F.2d at 746-47.

127. *Id.* at 746; *see supra* note 95 and accompanying text.

128. *Ostrofe II,* 740 F.2d at 746-47.

129. H.S. Crocker Co. v. Ostrofe, 469 U.S. 1200 (1985).

130. *In re* Industrial Gas Antitrust Litig. (Bichan v. Chemetron Corp.), 681 F.2d 514, 515 (1982), *cert. denied,* 460 U.S. 1016 (1982). Like Ostrofe, Bichan alleged that his employer was part of a conspiracy in violation of section 1 of the Sherman Act to fix prices, impose conditions of sale on customers, and allocate markets. *Id.*

131. *Id.* at 518-20. The Seventh Circuit decision came after *Ostrofe I* but before the Ninth Circuit's reexamination in light of *Associated General.*

132. The court listed three tests: the target area test, the direct injury test, and the zone-of-interest test. *Id.* at 516. For an explanation of these tests, see 9 JULIAN O. VON KALINOWSKI, ANTITRUST LAW AND TRADE REGULATION § 101.02(2)(a)-(c) (1993).

133. *Bichan,* 681 F.2d at 517. Note that the target area test was implicitly rejected by the Supreme Court in *Associated General. See supra* note 90.

134. *Bichan,* 681 F.2d at 517. The court found that *Brunswick* limited antitrust injury to those injuries caused by the anticompetitive effect of the antitrust violation. *Id.* at 519. The court claimed that the *Ostrofe II* court ignored "*Brunswick*'s clear teachings." *Id.* Note, however, that *Bichan* was decided only four days after *McCready* and did not cite that case.

Even assuming arguendo that Bichan had suffered antitrust injury, the court did not believe that he was a proper section 4 plaintiff.[135] The court interpreted section 4's phrase "by reason of" to require a direct causal link between the antitrust violation and the injury.[136] Fearing that another interpretation would result in excessive private litigation, the court reasoned that Bichan's injury was indirectly caused by the alleged price-fixing conspiracy and denied him standing.[137]

III. California Antitrust Standing Analysis

A. Standing Requirements Under Business and Professions Code Section 16750

In interpreting the Cartwright Act standing provisions, found in California Business and Professions Code section 16750, California courts have historically followed federal court interpretations of the analogous language in section 4 of the Clayton Act.[138] However, the Cartwright Act's history and amendments favor a broader interpretation than the federal courts have given the analogous section 4 language.

(1) Current Status of Standing and Antitrust Injury Under the Cartwright Act

Although the contours of standing under the Cartwright Act are unclear,[139] California courts have formed a rough framework, with some ideas plucked from federal antitrust standing decisions and others generated from whole cloth. Throughout the cases, the courts have recognized the importance of private enforcement.[140]

In a 1924 decision, that could be called a precursor to *USA Petroleum,* the California Supreme Court refused to give standing to a plaintiff who benefited rather than suffered from an antitrust violation.[141] The courts also recognized early on that a plaintiff's injury

135. *Id.* at 519.

136. *Id.* The court maintained that this requirement prevents a flood of litigation that would result in enforcement "overkill." *Id.*

137. *Id.* at 520. The court cited *Illinois Brick* for the proposition that the "by reason of" language limits antitrust standing to "efficient enforcers." *Id.* This Note maintains that a wrongfully discharged employee is an efficient enforcer. *See infra* Part IV.D.

138. *See* Smith, *supra* note 54, at 121.

139. *See* Cellular Plus, Inc. v. Superior Court, 18 Cal. Rptr. 2d 308, 313 (Ct. App. 1993).

140. *See, e.g.,* Saxer v. Philip Morris, Inc., 126 Cal. Rptr. 327, 333 (Ct. App. 1975) (citing Chicago Title Ins. Co. v. Great W. Fin. Corp., 444 P.2d 481, 492 (Cal. 1968), for the proposition that private enforcement is authorized and encouraged).

141. Overland Publishing Co. v. H.S. Crocker Co., 222 P. 812, 813 (Cal. 1924). A printer claimed that the defendants conspired to raise prices. The court noted that the plaintiff could bid freely for printing work and thus benefited from its competitor's high

must be related to the restriction of trade or commerce caused by a conspiracy and not merely result from some other unlawful act committed by a trust.[142]

Later cases have adopted much of the reasoning of federal courts. Thus, California courts have adopted the Ninth Circuit "target area" test: the plaintiff must be within "the area which it could reasonably be foreseen would be affected."[143] A plaintiff must show that its injuries are proximately caused by the antitrust violation.[144] Additionally, injuries cannot be "secondary," "consequential," or too "remote"; yet, the courts recognize that the "Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices."[145]

Furthermore, California courts have explicitly adopted the *Brunswick* antitrust injury requirement.[146] Thus, the courts have adopted a refinement of the "target area" test: the "plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions."[147]

Nonetheless, California courts have recognized that although "California law similarly requires an 'antitrust injury,' the scope of that term is broader [under the Cartwright Act]."[148] Courts should rigorously examine this broader scope when considering the case of the wrongfully discharged employee.

(a) Federal Law—A Caveat

Despite the California judiciary's reliance on federal interpretation, it is important to remember that California courts are free to

prices. The plaintiff therefore could not show damages, and only the attorney general or district attorney could bring the action. *Id.*

142. Krigbaum v. Sbarbaro, 138 P. 364, 366 (Cal. Ct. App. 1913) (holding that wrongful acts of the defendant do not give rise to a cause of action under the Cartwright Act merely because that defendant also happens to be an illegal trust); Munter v. Eastman Kodak Co., 153 P. 737, 739 (Cal. Ct. App. 1915) (citing and agreeing with *Krigbaum*).

143. *Saxer,* 126 Cal. Rptr. at 338 (quoting Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 220 (9th Cir. 1964), *cert. denied,* 379 U.S. 880 (1964)).

144. *Id.* at 336 (citing Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073, 1075 n.3 (9th Cir. 1970), *cert. denied,* 402 U.S. 923 (1971)).

145. *Id.* at 338 (quoting Hoopes v. Union Oil Co., 374 F.2d 480, 485 (9th Cir. 1967); Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied,* 342 U.S. 919 (1951); Mandeville Island Farms Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948)).

146. Kolling v. Dow Jones & Co., 187 Cal. Rptr. 797, 807 (Ct. App. 1982) ("An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful.").

147. *Id.* (quoting Solinger v. A&M Records, Inc., 586 F.2d 1304, 1310 (9th Cir. 1978), and adopting the Ninth Circuit's reasoning).

148. Cellular Plus, Inc. v. Superior Court, 18 Cal. Rptr. 2d 308, 313 (Ct. App. 1993).

interpret the Cartwright Act in a different manner than federal courts interpret federal antitrust laws and have done so in the past. For example, the California courts have diverged from the federal judiciary in summary judgment standards for showing the existence of a conspiracy[149] and on the question of whether an intra-enterprise agreement can violate antitrust laws.[150]

Additionally, the opinions adopting federal interpretations did so under the conception that "the Cartwright Act is patterned upon the federal Sherman Anti-Trust Act."[151] However, in 1988, the California Supreme Court recognized that this notion is false.[152] The Cartwright Act was actually patterned after the antitrust statutes of two other states. This finding would suggest that pre-1988 Cartwright Act opinions based on federal interpretation may not carry full precedential weight. Finally, the California Supreme Court has cautioned that federal interpretations of the analogous Clayton Act section 4 language are not necessarily persuasive. As a 1985 decision stated, the Cartwright Act is "broader in range and deeper in reach than the Sherman Act."[153]

(b) California Adoption of Ninth Circuit Tests—Another Caveat

Cartwright Act decisions adopting federal interpretations have almost invariably relied on Ninth Circuit decisions.[154] However, the Ninth Circuit has abandoned some of the theories, such as the "target area" test, upon which the California courts still rely.[155] This situation again cautions against blind adherence to previous California court decisions. This process of absorption of federal antitrust case law into California decisions tends to leave old, and possibly abandoned, federal concepts ingrained in Cartwright Act jurisprudence. Thus, if a Cartwright Act concept is rooted in federal case law, a court should scrutinize that concept to determine whether it is still valid.

149. *See* Biljac Assocs. v. First Interstate Bank, N.A., 267 Cal. Rptr. 819, 827-28 (Ct. App. 1990) (refusing to adopt the summary judgment standards set forth by the United States Supreme Court for finding a conspiracy).

150. *Cf.* MacManus v. A.E. Realty Partners, 241 Cal. Rptr. 315, 318 & n.4 (Ct. App. 1987) (leaving open whether California will adopt the United States Supreme Court rule barring challenges to intra-enterprise conspiracies).

151. Saxer v. Philip Morris, Inc., 126 Cal. Rptr. 327, 333 (Ct. App. 1975).

152. State *ex rel.* Van de Kamp v. Texaco, Inc., 762 P.2d 385, 395 (Cal. 1988).

153. Cianci v. Superior Court, 710 P.2d 375, 384 (Cal. 1985).

154. *See supra* notes 143-47 and accompanying text.

155. *Compare* R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139, 146 (9th Cir. 1989) (abandoning "target area" test) *with* Cellular Plus, Inc. v. Superior Court, 18 Cal. Rptr. 2d 308, 312 (Ct. App. 1993) (stating that the plaintiff must be within the "target area" to have standing under the Cartwright Act).

(2) Why California Antitrust Standing Should Be Different than Federal Antitrust Standing

(a) Historical Context of the Cartwright Act's Adoption

The California Supreme Court has attributed various and sometimes conflicting roots to the Cartwright Act. In different cases, it has asserted that the Cartwright Act was modeled after: (1) Senator Reagan's alternative bill to the Sherman Act; (2) the Sherman Act itself; and (3) the common law.[156] Ultimately, the court alleviated the confusion and declared the antecedents of the Cartwright Act to be the populist 1889 Texas and the 1899 Michigan antitrust acts.[157]

The private damages section of the Cartwright Act seems to find its lineage in the Michigan act. Unlike the 1889 Texas act, section 11 of the Cartwright Act[158] allowed for private causes of action.[159] However, the private damages provision of section 11 of the Cartwright Act virtually mirrors the 1899 Michigan act.[160] Additionally, although

156. For the three respective conclusions, see *Van de Kamp*, 762 P.2d at 387 (citing *Cianci*, 710 P.2d at 384; Marin County Bd. of Realtors v. Palsson, 549 P.2d 833, 835-36 (Cal. 1976); and Corwin v. Los Angeles Newspaper Serv. Bureau, Inc., 484 P.2d 953, 959 (Cal. 1971)).

157. *Van de Kamp*, 762 P.2d at 392.

158. This section later became California Business and Professions Code section 16750. *See* Act of Sept. 13, 1941, ch. 526, 1941 Cal. Stat. 1834, 1836.

159. Act of Mar. 23, 1907, ch. 530, § 11, 1907 Cal. Stat. 984, 987. Although the 1889 Texas act did not provide for private causes of action, Texas courts did allow suits for damages caused by a conspiracy in restraint of trade. *See* THE MARKETING LAWS SURVEY, STATE ANTITRUST LAWS 724 (1940) (citing Texas Pub. Utils. Corp. v. Edwards, 99 S.W.2d 420 (Tex. Civ. App. 1936); North Tex. Gin Co. v. Thomas, 277 S.W. 438 (Tex. Civ. App. 1925)).

160. Section 11 of the Cartwright Act read:

> In addition to the criminal and civil penalties herein provided, any person who shall be injured in his business or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any court having jurisdiction thereof in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover twofold the damages by him sustained, and the costs of suit. Whenever it shall appear to the court before which any proceedings under this act may be pending, that the ends of justice require that other parties shall be brought before the court, the court may cause them to be made parties defendant and summoned, whether they reside in the county where such action is pending, or not.

Act of Mar. 23, 1907, ch. 530, § 11, 1907 Cal. Stat. 984, 987.

The Michigan act read:

> In addition to the criminal and civil penalties herein provided, any person who shall be injured in his business or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any court having jurisdiction thereof in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy,

several contemporary state antitrust laws allowed private causes of action, only the California and Michigan laws provided for twofold damages.[161] In contrast, the precursor to section 4 of the Clayton Act provided for treble damages.[162]

These antecedents show that the Cartwright Act's standing provision, from its inception, was distinct from that of the Sherman Act. As section 11 of the Cartwright Act was not modeled after the Sherman Act, cases relying on federal standing analysis are, *a fortiori,* less compelling. Nonetheless, the extensive legislative history of the Sherman Act may help to show the prevailing *interpretation* of the language used in the Cartwright Act at the time of its enactment.[163]

In contrast to present-day debates over the meaning of section 4 of the Clayton Act, one early commentator stated, "This section is so plain and precise in all its parts that it requires only to be attentively read in order to be understood."[164] The legislative debate surrounding the adoption of the Sherman Act seems to concur with this broad interpretation; thus, most commentators find support in these debates for wrongfully discharged employee standing.[165] The populist outcry

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and to recover two-fold the damages by him sustained, and the costs of suit. Whenever it shall appear to the court before which any proceeding under this act may be pending, that the ends of justice require that other parties shall be brought before the court, the court may cause them to be made parties defendant and summoned, whether they reside in the county where such action is pending, or not.

Act of June 23, 1899, no. 255, § 11, 1899 Mich. Pub. Acts 409, 411-12.

The only differences between the two sections are the addition of a comma and the lack of a hyphen in "twofold" in the California act.

161. By 1915, 35 states had enacted antitrust legislation. James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918,* 135 U. PA. L. REV. 495, 499 (1987). Twenty states expressly allowed for private recovery of damages: nine states allowed for recovery of actual damages, nine permitted treble damages, and two (California and Michigan) allowed twofold damages. *Id.* at 500.

162. Section 7 of the original Sherman Act provided for threefold damages for any person injured in business or property by reason of a violation of that Act. This section was superseded by section 4 of the Clayton Act (section 7 was repealed by Act of July 7, 1955, ch. 283, § 3, 69 Stat. 282, 283), which is applicable to the antitrust laws—the Sherman Act, Clayton Act, and Robinson-Patman Act. Senator Sherman first proposed a twofold damages provision, *see* ALBERT H. WALKER, HISTORY OF THE SHERMAN LAW 8-9 (Greenwood Press 1980) (1910), but the final version provided for threefold damages.

163. For example, the California Supreme Court noted that the California Legislature probably adopted the language of the Cartwright Act with the judicial gloss of interpretations of the Texas and Michigan acts' language. State *ex rel.* Van de Kamp v. Texaco, Inc., 762 P.2d 385, 393-94 (Cal. 1988).

164. WALKER, *supra* note 162, at 61 (commenting on the interpretation of section 7 of the Sherman Act, which is the precursor to section 4 of the Clayton Act).

165. *See, e.g.,* Lynch, *supra* note 19, at 992 ("Congress intended to 'open the door of justice to every man, whenever he may be injured by those who violate the antitrust laws.'"); *Employee Standing Under Section 4 of the Clayton Act, supra* note 19, at 1857 n.52

that provided the historical backdrop to the adoption of the Sherman Act also supports a broad interpretation of the standing provision.[166] Nonetheless, modern courts have found this history less than dispositive.[167] However, the California Legislature was most likely aware of this early plain-meaning interpretation when it adopted the Cartwright Act.

The reasoning in *Associated General* also lends credence to the argument that the California Legislature adopted the Cartwright Act with a broad standing interpretation in mind. The *Associated General* Court determined that Congress adopted the language of section 7 of the Sherman Act for section 4 of the Clayton Act with a "judicial gloss that avoided a simple literal interpretation."[168] Between the enactment of section 7 of the Sherman Act in 1890 and the adoption of the Clayton Act in 1914, courts had interpreted the language of section 7. According to the *Associated General* Court, Congress adopted the judicial interpretation—not the plain meaning—when it incorporated the language of section 7 into the Clayton Act.

In support of this contention, the Court cited two cases limiting standing when a plaintiff's injury is too remote or merely derivative of a corporate injury.[169] These cases, the first to address the language of section 7, were decided in 1910 and 1909 respectively, and both cases

("legislative history supports a broad construction of § 4's antecedent"). *But see* Feldman, *supra* note 19, at 568 (noting that Congress did not enact an amendment that would have extended protection to any person driven out of business for refusing to become a party to an antitrust conspiracy). Such an amendment was adopted by committee in the 50th Congress, but was not included in the bill as re-introduced in the 51st Congress. *See* 1 LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 67, 112 (E. Kitner ed. 1978).

166. *See* Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 530 & n.20 (1983) ("The legislative history of the section shows that Congress was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices by the giant trusts .... That history supports a broad construction of this remedial provision.").

167. *See id.* at 530 (recognizing that the legislative history of the Sherman Act supports a broad construction of the standing provision but nonetheless limiting the section's scope). *But see* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) ("The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.").

168. *Associated General,* 459 U.S. at 534.

169. *Id.* at 534 & n.29. The Court cited Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910), which held that neither a creditor nor a stockholder of a corporation had standing under section 7 of the Sherman Act because their injuries were too indirect, remote, and consequential. The *Leob* court reasoned that Congress did not intend to override established corporate law concepts. *Id.* The Court also cited Ames v. American Tel. & Tel. Co., 166 F. 820, 822-23 (D. Mass. 1909), which held that a stockholder did not have standing under section 7 for injuries not distinguishable from those of the corporation. The *Ames* court also reasoned that the Sherman Act did not overrule the principle that shareholders' interests are represented by the corporation. *Id.*

held that Congress did not intend to override established corporate law with the broad language of the Sherman Act. Because no published cases interpreted the language of section 7 prior to the Cartwright Act's adoption in 1907, the California Legislature did not adopt this standing language with the narrowing judicial gloss.

The historical context of the adoption of the Cartwright Act also compels a broad interpretation of the standing provision. The economic changes and the advent of trusts in the late 1800s meant that "[f]armers, traders, laborers, individual business proprietors and small business enterprises were frequently rendered helpless and often disappeared in the fierce wars of the leviathons [sic] of the new order."[170] "The trust became a curse. It was an octopus devouring the vitals of the nation."[171] This situation caused a "great groundswell of discontent, bitter resentment and articulate indignation" amongst the public.[172] The "sweeping flames of public protest" resulted in the adoption of state antitrust laws.[173] In this context, the California Legislature presumably intended a broad standing provision to channel populist outrage against the goliath trusts and provide redress for the powerless common man.

The historical context of the Cartwright Act's adoption, the congressional debate on similar language in the Sherman Act, the populist statutory antecedents, and the prevailing broad interpretation of the statutory language direct the conclusion that the California Legislature intended that the Act include a broad grant of antitrust standing.

(b) Amendments to the Cartwright Act

Several amendments to the Cartwright Act verify the legislative intent to endow broad Cartwright Act standing on private litigants. These amendments also show a legislative intent to enhance the vitality and reach of private enforcement. This intent to expand private enforcement is obvious from the plain meaning, legislative history, and historical context of the adoption of these amendments.

In 1959, the California Legislature amended section 16750 by replacing twofold damages with threefold damages and by providing for attorneys' fees and costs. The amendment "was proposed by the [California] Attorney General as part of a program to strengthen enforce-

170. Rush H. Limbaugh, *Historic Origins of Anti-Trust Legislation,* 18 Mo. L. Rev. 215, 237 (1953).

171. *Id.* at 241.

172. *Id.* at 240.

173. *See id.* at 240-43.

ment of the State Antitrust laws."[174] Because the federal antitrust statutes provided for threefold damages, plaintiffs were seeking redress under the Sherman Act whenever possible.[175] The increase to threefold damages and the award of attorneys' fees and costs were to encourage "greater use [of the Cartwright Act] and make it, therefore, a more effective deterrent to unlawful restraints upon trade."[176] As the author of the amendment stated,

> Experience has shown that the most effective deterrent to businessmen from a violation of the antitrust laws is the real threat to their pocketbooks arising from the potential liability for three times the damage they have inflicted . . . . Moreover, antitrust litigation is notoriously expensive. A successful plaintiff should be allowed to recover a reasonable attorney's fee as well as the costs of suit.[177]

This amendment was passed overwhelmingly by both the State Senate and Assembly.[178] Significantly, it was enacted at a time when a broad interpretation of antitrust standing was not questioned.[179]

Already having increased the incentive to employ the Cartwright Act, in 1961 the California Legislature sought to ensure the effectiveness of the Cartwright Act. The 1961 amendment clarified that under the existing law[180] the state, political subdivisions thereof, and state public agencies were "persons" for purposes of section 16750 and thus may have standing to bring a Cartwright Act action.[181] The amendment also made clear that the state Attorney General could bring suit on behalf of any one of the aforementioned entities.[182]

Although not directly bearing on the scope of private enforcement, the 1961 amendment "commits the State of California to the maintenance of competitive markets and the protection of consumers

174. Letter from Wallace Howland, Assistant Attorney General, to Governor Edmund G. Brown (June 19, 1959) (on file at the California State Archives, Governor's Chapter Bill File, ch. 2078 (1959) (MF 3:2(27))).

175. *Id.*

176. *Id.*

177. Letter from Assemblyman Bruce F. Allen, author of the proposed amendment, A.B. 2593, to Governor Edmund G. Brown (June 24, 1959) (on file at the California State Archives, Governor's Chapter Bill File, ch. 2078 (1959) (MF 3:2(27))).

178. The Senate passed the amendment by a vote of 26 to 3, and the Assembly approved it by 62 to 1. Bill Memorandum from Julian Beck, Governor's Legislative Secretary, to Governor Edmund G. Brown (July 13, 1959) (on file at the California State Archives, Governor's Chapter Bill File, ch. 2078 (1959) (MF 3:2(27))).

179. *See* Blair & Harrison, *supra* note 44, at 1543-44 (stating that the narrowing of private antitrust standing began in 1977).

180. *See* Act of Sept. 15, 1961, ch. 1023, 1961 Cal. Stat. 2705, 2706 (amending CAL. BUS. & PROF. CODE § 16750 and declaring that the amendment only restated the original intent of the Cartwright Act).

181. *Id.* sec. 1(b), 1961 Cal. Stat. at 2706.

182. *Id.* sec. 1(c), 1961 Cal. Stat. at 2706.

from private monopoly."[183] Like the 1959 amendment, the 1961 amendment was introduced "at the request of the Attorney General to strengthen the anti-trust laws."[184] In fact, the Governor held the need for antitrust enforcement to be so important that he designated the amendment an "emergency bill" that the legislature should consider immediately.[185] As Part IV discusses, wrongfully discharged employees are uniquely situated to bolster the State's commitment to antitrust enforcement. A grant of standing would further these legislative goals.

In 1978, the California Legislature took the Cartwright Act standing analysis off the federal track. In reaction to the United States Supreme Court's *Illinois Brick* decision declaring that indirect purchasers do not have standing under section 4 of the Clayton Act, the Legislature amended section 16750 to repudiate the *Illinois Brick* rule.[186] The 1978 amendment assured standing for indirect purchasers and anyone else who indirectly dealt with the defendant.[187]

This amendment was a major departure from California's history of following federal antitrust precedent.[188] The amendment is a clear indication that California courts should not consider *Illinois Brick* factors to be dispositive on the issue of private standing. The legislature noted these concerns—multiple liability and duplicative recoveries, massive evidence and complex apportionment, and the existence of

183. J.F. Barron, *California Antitrust—Legislative Schizophrenia,* 35 S. CAL. L. REV. 393, 405 (1962).

184. Bill Memorandum from Alexander H. Pope, Governor's Legislative Secretary, to Governor Edmund G. Brown (June 28, 1961) (on file at the California State Archives, Governor's Chapter Bill File, ch. 1023 (1961) (MF 3:2(31))).

185. Letter from Governor Edmund G. Brown to the Honorable Members of the Assembly and Senate (Apr. 10, 1961) (on file at the California State Archives, Governor's Chapter Bill File, ch. 1023 (1961) (MF 3:2(31))). Because the State and its agencies are required to purchase equipment and supplies by sealed competitive bidding, the State is particularly affected by price-fixing, collusive bidding, market allocation, customer division, and other antitrust violations. Working Papers of Assemblyman Edwin L. Z'Berg (on file at the California State Archives, Assemblyman Edwin L. Z'Berg, A.B. 893 (1961) (MF 6:3(15))). The Legislature thus considered the standing clarification urgent. Letter from Assemblyman Edwin L. Z'Berg to Governor Edmund G. Brown (Apr. 7, 1961) (on file at the California State Archives, Assemblyman Edwin L. Z'Berg, A.B. 893 (1961) (MF 6:3(15))).

186. *See* Act of Aug. 25, 1978, ch. 536, sec. 1, § 16750(a), 1978 Cal. Stat. 1693, 1693 (codified as CAL. BUS. & PROF. CODE § 16750(a)).

187. *Id.*

188. *See* Smith, *supra* note 54, at 121 ("California traditionally has harmonized interpretations of its own antitrust statutes with federal interpretations of the Sherman-Clayton antitrust acts. The California Legislature sounded a discordant note in 1978 . . . ." (footnotes omitted)).

other potential attorneys general[189]—but passed the amendment unanimously.[190] The amendment preserved the progressive consumer protections for which California is known.[191]

(3) Can California Antitrust Standing Be Different?

The difference caused by the 1978 Amendment between the standing provisions of section 16750 and section 4 of the Clayton Act came into focus in *California v. ARC America Corp.* .[192] California and a number of other states brought an action against several cement producers, alleging a "nationwide conspiracy to fix prices in violation" of both federal and the respective state statutes.[193] At issue in the case was the Ninth Circuit's holding that section 4 of the Clayton Act, as interpreted by *Illinois Brick,* preempted the state antitrust statutes allowing recovery for indirect purchasers.[194] However, the United States Supreme Court found that "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies."[195] Furthermore, "nothing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws."[196] The state laws allowing such actions are "consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct."[197] Accordingly, the Court held that the state antitrust laws were not preempted.[198]

Significantly, the Court did not address whether the indirect purchaser provisions violated the Commerce Clause by burdening interstate commerce. Arguably, the issue was covered by the Court's decisions construing other state commercial statutes.[199]

189. Assembly Committee on the Judiciary, Bill Digest, A.B. 3222 (May 11, 1978) (on file at the California State Archives, Senate Committee on Judiciary, A.B. 3222 (1978) (MF 1:51(14))).

190. Enrolled Bill Memorandum to Governor, A.B. 3222 (Aug. 22, 1978) (on file at the California State Archives, Governor's Chapter Bill File, ch. 536 (1978) (MF 3:3(50))).

191. Letter from John W. Witt, San Diego City Attorney, to Senator Alfred H. Song, Chairman of the Senate Judiciary Committee (June 6, 1978) (on file at the California State Archives, Senate Committee on Judiciary, A.B. 3222 (1978) (MF 1:51(14))).

192. 490 U.S. 93 (1989).

193. *Id.* at 97-98.

194. *Id.* at 99.

195. *Id.* at 102.

196. *Id.* at 103.

197. *Id.* at 102.

198. *Id.* at 105-06.

199. *See* Michael Edwards, Contribution, *The California Cartwright Act,* 4 GLENDALE L. REV. 233, 247-49 (1982) (arguing that the indirect purchaser provision of the Cartwright Act is not unconstitutional under Supreme Court decisions).

The Supreme Court allowed the state laws to operate even though the scope of their standing provisions directly contradicted federal interpretation of analogous antitrust laws. Under *ARC America,* California courts appear to be free to grant standing to wrongfully discharged employees under the Cartwright Act despite any contrary Clayton Act section 4 holdings by the United States Supreme Court.

IV. A Wrongfully Discharged Employee Should Have Standing Under the Cartwright Act

It is still unclear whether a wrongfully discharged employee can have standing under section 4 of the Clayton Act. However, given the ambiguity of antitrust standing under the Cartwright Act, California courts should seize the opportunity to benefit from the unique enforcement position of such an employee. Such private attorneys general offer access to information not available to other litigants. At the same time, these plaintiffs do not present the difficulties often inherent in private litigants. For example, a wrongfully discharged employee is unlikely to have an incentive, as would a competitor, to use the antitrust laws to pervert competition.[200] Additionally, granting standing to wrongfully discharged employees would be consonant with the legislative intent of promoting private enforcement and with Cartwright Act case law.

A. Case Support

Two California appellate court cases may be applied to support the grant of standing to a wrongfully discharged employee. In *Alfred M. Lewis, Inc. v. Warehousemen Local Union No. 542,*[201] the plaintiff claimed that a labor strike against it was part of a conspiracy between the plaintiff's competitors and the union.[202] The union and the plaintiff's competitors had agreed that the union would demand higher wages from the plaintiff. These higher wages were intended to make competition with the plaintiff's competitors unprofitable.[203] When the plaintiff refused to raise its wages, the union declared a strike and picketed the plaintiff's premises.[204] The plaintiff sought to enjoin the strike, but the trial court found for the defendant, holding that the

200. For a full discussion of the difficulties inherent in private antitrust enforcement, see discussion *infra* Part IV.D.

201. 330 P.2d 53 (Cal. Ct. App. 1958).

202. *Id.* at 55-56. The San Diego Fresh Fruit and Vegetable Dealers Association was an association of produce dealers that acted as a collective bargaining unit with the union. *Id.* The plaintiff, another produce dealer, was not a member of the association. *Id.*

203. *Id.* at 56.

204. *Id.*

National Labor Relations Act guaranteed the defendant's right to strike.[205]

The appellate court, noting first that injunctive relief could be sought under section 16750,[206] ruled that conduct "used to effect [a conspiracy] may result in actionable damages . . . even though such conduct if not used to effect the agreement would be lawful."[207]

From *Alfred M. Lewis* comes the concept that damaging conduct used to effectuate a conspiracy gives standing under the Cartwright Act. As recognized in *Ostrofe,* terminating an uncooperative employee is conduct that can effectuate an antitrust violation.[208] Additionally, unlike a normal labor strike, terminating a refusing or whistleblowing employee is unlawful in California. The unlawfulness of this conduct makes the application of *Alfred M. Lewis* even more logical. If the court is willing to make actionable lawful conduct used to effectuate a conspiracy, the court should be more willing to make unlawful conduct actionable.

In *Guild Wineries & Distilleries v. J. Sosnick & Son,*[209] a wine distributor (Sosnick) refused to enter into an illegal market allocation agreement with a producer-distributor (Guild).[210] Allegedly because of this refusal, Guild terminated Sosnick as a distributor.[211] The court ruled that if Guild terminated Sosnick because of a refusal to enter into an illegal agreement, "the termination itself is in violation of the Cartwright Act."[212]

Like Sosnick in *Guild Wineries,* a wrongfully discharged employee is terminated for refusal to participate in an antitrust violation. However, unlike the litigants in both of the above cases, a wrongfully discharged employee is not a competitor. Nevertheless, the "statute does not confine its protection to . . . competitors."[213] Thus, despite this distinction, *Alfred M. Lewis* and *Guild Wineries* support the grant of antitrust standing to such employees.

205. *Id.* The trial court recognized that the defendant's agreement violated the Cartwright Act but ruled that the federal law precluded the application of the Act. *Id.*

206. *Id.* at 59.

207. *Id.* at 60.

208. *See supra* notes 122-25 and accompanying text.

209. 162 Cal. Rptr. 87 (Ct. App. 1980).

210. *Id.* at 89. Agreements that allocate markets between competitors are per se violations of the Sherman Act. United States v. Topco Assocs., 405 U.S. 596, 608 (1972). Because Guild had entered the distribution market, it was both a supplier and competitor of Sosnick.

211. *Guild Wineries,* 162 Cal. Rptr. at 89.

212. *Id.* at 93 (ruling that Sosnick's proposed jury instruction, *see id.* at 90 n.3, should have been given).

213. Saxer v. Philip Morris, Inc., 126 Cal. Rptr. 327, 338 (Ct. App. 1975) (quoting Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948)).

B. Adoption of Federal Standing Analysis in California Courts Would Be Modified by the 1978 Amendment to the Cartwright Act

If the California courts were to continue to follow federal antitrust standing precedent, the courts would have to modify the analysis in light of the Legislature's rejection of *Illinois Brick* and its desire to expand Cartwright Act standing. Specifically, if the courts were to adopt the standing analysis enunciated in *Associated General,* California courts would be precluded from incorporating the second, third, fourth, and fifth factors, namely, the indirectness of injury, the existence of more directly injured potential plaintiffs, the speculative nature of the damages, and the potential for duplicative recovery and complex litigation.[214] Clearly, the courts could not consider the *Illinois Brick* concerns of duplicative recoveries and complex litigation, but the 1978 amendment also precludes the other three considerations because they are related to the indirectness of the injury.[215]

The California courts would thus be left with the first part of the *Associated General* test: antitrust injury.[216] Because the federal courts have not agreed whether a wrongfully discharged employee has standing under section 4 of the Clayton Act, even strict adherence to federal interpretation would leave open the question of such an employee's standing under the Cartwright Act.

C. Isn't the Tort of Wrongful Discharge Enough?

Since *Tameny* established that, in California, a wrongfully discharged employee can state a tort cause of action, such an employee can be compensated for injuries.[217] Compensation, however, is only one reason for private standing under the Cartwright Act.[218] The deterrent value of granting standing to wrongfully discharged employees is great.[219] Not only would employers fear exposure by such employees, but even if the employer did not terminate the employee, the employee who refused to participate in an antitrust violation would act as an obstruction to the violation.

Additionally, the lure of treble damages and attorneys' fees is needed to induce more employees to expose their employers' violations. Employees who refuse to participate in their employers' viola-

214. *See supra* notes 97-101 and accompanying text.

215. The speculative nature of damages and the existence of more direct victims arise because of the indirectness of the injury. However, the 1978 amendment guarantees standing to those who deal indirectly with the defendant. CAL. BUS. & PROF. CODE § 16750 (West 1995).

216. *See supra* note 91 and accompanying text.

217. *See supra* note 35 and accompanying text.

218. *See* Berger & Bernstein, *supra* note 7, at 809.

219. *See, e.g.,* Shaw, *supra* note 19, at 391 (noting that "[e]mployees are in the best position to detect and disclose covert anticompetitive schemes").

tions or who inform enforcement authorities of those violations may face adverse career consequences even after they leave their employers.[220] Furthermore, wrongful discharge actions may not suffice to compensate the employee for the loss of reputation and career prospects.[221]

However, the existence of a tort cause of action enhances the desirability of granting antitrust standing to wrongfully discharged employees. Antitrust actions are notoriously expensive and complex. Thus, wrongfully discharged employees with weak cases will lean toward the simpler tort cause of action.[222] The existence of the tort thus acts to screen potential litigants and ensures that discharged employees will not bring frivolous antitrust claims. The lure of treble damages and attorneys' fees may be outweighed by the complexity, expense, and attendant risk of an antitrust action. With the simpler alternative of a tortious wrongful discharge claim, allowing wrongfully discharged employees to bring Cartwright Act claims would not provoke excessive antitrust litigation.

Finally, granting antitrust standing to wrongfully discharged employees would accomplish one thing that the tort remedy could never accomplish: a collateral estoppel effect for follow-on litigation by other antitrust victims. Because a wrongful discharge tort plaintiff need not prove the underlying violation,[223] such a tort action may not explore the underlying antitrust violation. This failure makes wrongful discharge tort actions useless to other victims. Only a fully litigated antitrust case, which can only be accomplished by granting standing to wrongfully discharged employees, can have the collateral estoppel and thus deterrent effects necessary to enhance antitrust compliance.

220. *See, e.g.*, Hal Lancaster, *Workers Who Blow the Whistle on Bosses Often Pay a High Price*, WALL ST. J., July 18, 1995, at B1 (discussing how whistleblowing affected three individuals' careers).

221. *See id.*

222. In a wrongful termination action, a discharged employee need not prove that the employer actually violated the underlying law; the employee need only reasonably believe that the alleged corporate action was illegal or unsafe. *See* cases cited *infra* note 223.

223. *Cf.* Collier v. Superior Court, 279 Cal. Rptr. 453, 453 (Ct. App. 1991) (allowing wrongful discharge tort action for employee allegedly discharged for reporting suspicions that co-employees were engaged in illegal activity); Hentzel v. Singer Co., 188 Cal. Rptr. 159, 165 (Ct. App. 1982) (allowing wrongful discharge tort action for employee allegedly discharged for protesting working conditions reasonably believed to be unsafe).

D. Enforcement Value

The use of private attorneys general to enforce antitrust laws has been attacked by some commentators;[224] nevertheless, "private enforcement [of the Cartwright Act is] authorized and encouraged."[225] The amendments to the Cartwright Act show that the California Legislature values privates attorneys general as enforcers. In contrast, Congress has not amended section 4 of the Clayton Act in any way to encourage private litigants.[226]

In addition to serving the Legislature's desire to encourage private enforcement, a grant of standing to wrongfully discharged employees avoids the pitfalls found in suits brought by other private litigants. Criticism of private antitrust enforcement centers around several asserted deficiencies. First, private antitrust litigation can be used improperly to subvert competition.[227] Second, private enforcement focuses on more visible violations; thus, for those violations, the need to encourage private enforcement is limited.[228] Third, treble damages and joint and several liability rules may be used to extort payment even when litigation success is unlikely.[229] Fourth, the prospect of treble recovery may be an incentive not to avoid antitrust damages.[230] Finally, unlike public enforcement, private enforcement demands that resources be used to determine and allocate damages.[231]

A wrongfully discharged employee would be an appropriate Cartwright Act private litigant because such an employee would not significantly implicate these concerns. First, the employee would be

224. *See, e.g.*, KENNETH G. ELZINGA & WILLIAM BREIT, THE ANTITRUST PENALTIES 81-96 (1976) (arguing that private actions are a source of perverse incentives, generate misinformation in the form of nuisance suits, and use up scarce resources).

225. Saxer v. Philip Morris, Inc., 126 Cal. Rptr. 327, 333 (Ct. App. 1975).

226. *See* 15 U.S.C. § 15 (1994). However, the Hart-Scott-Rodino Act authorizes state attorneys general to bring civil actions in the name of their state or as parens patriae on behalf of state residents. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, sec. 301, 1976 U.S.C.C.A.N. (90 Stat.) 1383, 1394-96 (codified as 15 U.S.C. § 15c). This amendment does not, however, encourage private attorneys general.

227. *See generally* William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition,* 28 J.L. & ECON. 247 (1985) (arguing that private antitrust litigation may be used to seek protection from competition).

228. *See* Thomas E. Kauper & Edward A. Snyder, *An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-On and Independently Initiated Cases Compared,* 74 GEO. L.J. 1163, 1164 (1986) ("[B]ecause vertical practices are not likely to be covert, one rationale for trebling damages, to encourage efforts to detect offenses, may not apply.").

229. *See* ELZINGA & BREIT, *supra* note 224, at 90-95 (arguing that treble damages encourage antitrust "nuisance suits"); Kauper & Snyder, *supra* note 228, at 1164 (arguing that the joint and several liability rule allows the plaintiff to decide which defendant to go after).

230. *See* ELZINGA & BREIT, *supra* note 224, at 84 (arguing that treble damages provides a "perverse incentive" not to avoid incurring damages).

231. *See id.* at 95.

unlikely to misuse the antitrust laws because, unlike a competitor, the employee would not have a monetary incentive to pervert competition.[232] Second, a wrongfully discharged employee is also in a unique position to detect not only visible violations, but also covert antitrust violations that may not be uncovered without inside information.[233] Third, although an action could be used to extort payment, as could any wrongful discharge action, joint and several liability concerns would not arise because only the employer would be liable.[234] Fourth, public policy encourages an employee to refuse to participate in antitrust violations. Thus, unlike other litigants, policy dictates that an employee *not* change his behavior to avoid damages; otherwise, damaging antitrust violations will continue. Finally, the determination and allocation of damages in a wrongfully discharged employee case is relatively simple. While a competitor's alleged damages may in fact be caused by other economic factors, a discharged employee's damages are relatively easily linked to the loss of employment.

Finally, perhaps the strongest policy reason for allowing wrongfully discharged employees standing under the Cartwright Act is their ability to enhance enforcement efforts by detecting antitrust violations. Wrongfully discharged employees are in a unique position to detect covert antitrust violations.[235]

Private antitrust enforcement tends to "focus on conduct that is visible and has a clear 'victim.'"[236] Vertical offenses tend to be more overt than horizontal conspiracies—for example, a manufacturer may announce a vertical price restriction to its distributors, but a group of manufacturers will keep their price-fixing agreement secret. Thus, vertical offenses attract more litigation.[237] This situation has led to criticism of the private damages remedy because vertical restraints are now widely considered to be benign.[238]

232. A discharged employee who later competes with or works for a competitor of the former employer would have such an incentive; however, this possibility does not diminish the public utility of an action by the discharged employee. This incentive would be no greater than other presently accepted private antitrust litigants.

233. *See infra* notes 235-40 and accompanying text.

234. Although several parties may participate in the antitrust violation, only the employer causes injury to the plaintiff by termination.

235. *See* CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY 257 (1976) (stating that private antitrust enforcement "may be the most effective way of policing the multitude of . . . violations that will tend to escape the glance of . . . authorities").

236. Kauper & Snyder, *supra* note 228, at 1222.

237. *See id.* at 1164, 1180 tbl. 3 (showing, in a ten-year study of 1983 cases, that 47.3% of private independently initiated antitrust cases alleged vertical violations, as opposed to 28.5% alleging horizontal violations).

238. *See, e.g.*, POSNER, *supra* note 9, at 231 ("[T]he trebling of damages in cases where the alleged violation is not the kind that can normally be concealed is wholly unjustified[;] . . . it merely attracts excessive [litigation]."); Kauper & Snyder, *supra* note 228, at 1164 ("Economic analysis is generally more critical of cases alleging vertical offenses.").

However, wrongfully discharged employees can provide for detection of clandestine horizontal violations. Because, by definition, such an employee has refused to participate in an antitrust violation, the employee can provide direct evidence of the key issue in horizontal violation cases, namely, the existence of an agreement.[239] Wrongfully discharged employees can thus strengthen enforcement against the most troubling and anticompetitive antitrust violations[240] as well as more apparent conspiracies.

A recent action by the Department of Justice demonstrates this phenomenon. As a result of the cooperation of an employee, the Department is conducting an antitrust inquiry into the practices of Archer-Daniels-Midland Company (ADM) and other grain processors.[241] Mark Whitacre, the president of ADM's BioProducts Division, provided antitrust enforcement officials with secret recordings of hundreds of price-fixing conversations between ADM and its competitors.[242] Although Whitacre was not a wrongfully discharged employee, the type of information he provided demonstrates the enforcement value of antitrust actions by such employees. As discussed earlier, the lure of treble damages, attorneys' fees, and costs will induce wrongfully discharged employees with strong cases to come forward with the incriminating evidence that only an insider could possess. The courts would do well to recognize that these insiders are invaluable. "Therefore no one in the armed forces is treated as familiarly as are spies, no one is given rewards as rich as those given to spies, and no matter is more secret than espionage."[243]

E. *Vinci v. Waste Management, Inc.*: A Missed Opportunity

Recently, the California Court of Appeal for the First District was confronted with an opportunity to seize the antitrust enforcement value of the wrongfully discharged employee. The court failed to do so and forestalled California's utilization of these litigants indefinitely.

Leonard Vinci became an employee of Waste Management when Waste Management acquired his recycling business.[244] According to

239. *Cf.* Biljac Assocs. v. First Interstate Bank, N.A., 267 Cal. Rptr. 819, 834 (Ct. App. 1990) (dismissing case for insufficient proof of an agreement).

240. Even the Chicago School of antitrust theory, which is usually skeptical of antitrust intervention, recognizes that horizontal conspiracies are inherently anticompetitive. *See* William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221, 1223 (1989).

241. *Seeds of Doubt: An Executive Becomes Informant for the FBI, Stunning Giant ADM*, WALL ST. J., July 10, 1995, at A1.

242. *Id.*

243. SUN TZU, *supra* note 3, at 170.

244. Vinci v. Waste Management, Inc., 43 Cal. Rptr. 2d 337, 338 (1995). Vinci operated Vinci Enterprises, a competitor of Waste Management in the recycling market. *Id.*

Vinci, Waste Management was attempting to monopolize the San Francisco Bay Area garbage collection and recycling market by acquiring its competitors and by engaging in predatory pricing.[245] Vinci alleged that he was ordered to participate in Waste Management's anticompetive conduct, refused, and was discharged for his refusal.[246]

To determine whether Vinci had standing under the Cartwright Act, the court cited *Associated General* for a five-part antitrust standing test: "(1) the existence of an antitrust violation with resulting harm to the plaintiff; (2) an injury of a type which the antitrust laws were designed to redress; (3) a direct causal connection between the asserted injury and the alleged restraint of trade; (4) the absence of more direct victims so that the denial of standing would leave a significant antitrust violation unremedied; and (5) the lack of a potential for double recovery."[247] In denying standing to Vinci, the court focused on the second and fourth factors. Citing only federal authority, the court held that Vinci's termination was not the type of loss that the Cartwright Act was intended to prevent, that is, Vinci lacked antitrust injury.[248] The court noted that Vinci was not a competitor or participant in the recycling market and, citing *Bichan,* that Vinci's injury was not the result of Waste Management's acquisition of market power.[249]

Moreover, the court noted that the targets of the alleged anticompetitive conduct were the "normal parties to remedy the antitrust violation."[250] Thus, the court held that a wrongfully discharged employee is not a proper party to bring a Cartwright Act action.[251]

Ostrofe, despite being a Ninth Circuit case, did not deter the *Vinci* court. First, the court confined *Ostrofe* to the wrongfully discharged employee who is "an essential participant" in the antitrust violation, "which could not have succeeded without his active participation."[252] Second, the court noted that in *Ostrofe* there was no one else with a strong incentive to vindicate the public interest in antitrust enforce-

245. *Id.* at 339. The Cartwright Act does not have a provision analogous to section 7 of the Clayton Act, which prohibits mergers that "pose, at most, an incipient threat to competition." State *ex rel.* Van de Kamp v. Texaco, Inc., 762 P.2d 385, 396 (Cal. 1988). However, the Cartwright Act may prohibit attempted monopolization by anticompetitive conduct. *See State Antitrust Practice and Statutes, supra* note 21, at 6-16 (citing cases that apply the Cartwright Act to monopolization conduct but also cases that state that the Cartwright Act does not apply to single firm behavior).

246. *Vinci,* 43 Cal. Rptr. 2d at 339.

247. *Id.* at 339 (footnote omitted) (citing Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 537-44 (1983)).

248. *Id.* at 339-40.

249. *Id.* at 340.

250. *Id.*

251. *Id.*

252. *Id.*

ment.[253] Finally, the court claimed that subsequent Ninth Circuit decisions limited *Ostrofe* to its unique facts.[254] The court noted that Vinci had not alleged that he was an essential participant or the sole potential antitrust vindicator.[255] Thus, he did not fall under the *Ostrofe* rubric.

The *Vinci* decision fails for three reasons: (1) the court failed to recognize that Cartwright Act standing has diverged from federal antitrust standing analysis; (2) the court ignored the Cartwright Act's historical antecedents, subsequent legislative amendments, and California case law that address Cartwright Act standing; and (3) the court allowed the verbal formulation of antitrust injury to defeat the purpose of antitrust standing analysis—that of selecting efficient enforcers.

The *Vinci* court adopted a five-part standing analysis wholly from *Associated General.* However, the court did not recognize that the 1978 amendment placed antitrust standing under the Cartwright Act on a different path. As discussed in Part IV.B, this amendment precludes California courts from considering four of the five factors cited by the court. Because of this amendment, the court should not have considered whether there was a more direct victim of the violation. Thus, the court erred when it ruled that Vinci's standing was precluded because the targets of Waste Management's anticompetive scheme were more natural private attorneys general and because Vinci had not alleged that he was the sole vindicator.

Nevertheless, the court's consideration of antitrust injury was appropriate. The court, however, did not recognize that "the more restrictive definition of 'antitrust injury' under federal law does not apply to [the Cartwright Act]."[256] The court merely asserted that a wrongfully discharged employee has not suffered the type of injury that the antitrust laws were intended to prevent. In support of this proclamation, the court cited only federal cases. The court's decision lacked any reference to contrary federal decisions, California case law, or legislative history. The court mentioned neither *Alfred M. Lewis,* finding antitrust injury from conduct used to effectuate a conspiracy, nor *Guild Wineries,* finding antitrust injury for refusal to participate in an antitrust violation. In divining what injuries the California Legislature intended the Cartwright Act to redress, the court failed to analyze the Act's historical antecedents or the 1959, 1961, and 1978

253. *Id.*

254. *Id.* (citing Lucas v. Bechtel Corp., 800 F.2d 839, 846 (9th Cir. 1986); Exhibitors' Serv., Inc. v. American Multi-Cinema, 788 F.2d 574, 580 (9th Cir. 1986)).

255. *Id.*

256. Cellular Plus, Inc. v. Superior Court, 18 Cal. Rptr. 2d 308, 313 (Ct. App. 1993).

amendments. Instead, the court relied on federal cases interpreting the Sherman Act, whose antecedents are distinct.[257]

In further support of its contention, the court cited *Bichan* for the proposition that Vinci did not suffer antitrust injury because his injury was not the result of Waste Management's acquisition of market power.[258] However, this factor is merely another formulation of the target area test.[259] It seems anomalous that the same court should adopt the *Associated General* standing analysis and yet adopt the target area test that *Associated General* abandoned.

Additionally, the court noted that Vinci was not a competitor or a consumer in the affected market. However, the Cartwright Act "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers."[260]

The court made much of the *Ostrofe* "essential participant" language. The court found support for this focus in two subsequent Ninth Circuit decisions, neither of which dealt with a wrongfully discharged employee who exposes an antitrust violation.[261] It is not clear, however, how a court would determine whether a particular wrongfully discharged employee's participation is essential. Because a corporation can only act through its agents, seemingly any employee ordered to participate is essential. Nonetheless, any such test would not be applicable to the Cartwright Act. *Guild Wineries* gave standing

257. *Vinci,* 43 Cal. Rptr. 2d at 339-40.

258. *Id.* at 340.

259. The entire quote from *Bichan* is: "[W]e conclude that Bichan has sustained no 'antitrust injury' because, while he may have suffered some injury-in-fact, he was not the target of the alleged anticompetitive practices. His injury, therefore, did not result from defendants' acquisition or exploitation of market power." *In re* Industrial Gas Antitrust Litig. (Bichan v. Chemtron Corp.), 681 F.2d 514, 519 (1982), *cert. denied,* 460 U.S. 1016 (1982).

260. *Cellular Plus,* 18 Cal. Rptr. 2d at 312 (quoting Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948)).

261. *Vinci,* 43 Cal. Rptr. 2d at 340. Neither of the two cases involve a wrongfully discharged employee. In Exhibitors' Service, Inc. v. American Multi-Cinema, 788 F.2d 574, 580 (9th Cir. 1986), a licensing agent alleged that its termination was the result of a conspiracy between film distributors and exhibitors. The court found that the agent may have been discharged as part of the unlawful agreement, but its continued employment would not have stood in the way of the conspiracy. *Id.* at 580. Thus, *Ostrofe* did not apply.

Lucas v. Bechtel Corp., 800 F.2d 839, 840 (9th Cir. 1986), involved a claim by union electricians that their employer and national union conspired to restrain trade in the labor market to "monopolize the design and construction of nuclear power plants." The plaintiff complained that the restraint of trade depressed wages. Noting that competition tends to depress wages, the Ninth Circuit found that none of the *Associated General* factors applied. *Id.* at 844-46. *Ostrofe* did not apply because the electricians were not victims of a boycott nor were they an integral part of the anticompetive scheme to monopolize the nuclear power plant construction market. *Id.* at 846.

under that Act for those who refuse to participate in a violation.[262] Additionally, removing an obstructionist employee is part of the effectuation of such a violation. Thus, per *Alfred M. Lewis,* a wrongfully discharged employee would have standing under the Cartwright Act even if that employee's participation were not essential.

Finally, the court failed to look beyond the formulation of the antitrust injury test to the purposes of that test. Antitrust injury doctrine acts to sift through the legion of injured parties to discover efficient private enforcers. As discussed in Part IV.D, wrongfully discharged employees present unique enforcement advantages without the drawbacks inherent in many potential private attorneys general. In short, the *Vinci* court allowed the antitrust injury tail to wag the Cartwright Act dog. It allowed the semantic formulation of antitrust injury to defeat the purpose of that test and disqualified an attractive private enforcement litigant.

Conclusion

Wrongfully discharged employees are uniquely situated to vindicate the public interest in antitrust enforcement while avoiding the drawbacks of other private attorneys general. However, because the literal language of the Cartwright Act provides an overbroad standing provision, the courts are forced to limit the range of potential private litigants and seek efficient enforcement. Recognizing this need, the courts have developed the concept of antitrust standing as a means to uncover efficient enforcers. Do wrongfully discharged employees fall within the rubric of antitrust standing, or does this judicially developed screen for antitrust litigants sift them out despite their enforcement advantages? Because of the ambiguity in the federal antitrust injury test, federal courts faced with this question have reached contrary conclusions.

Notwithstanding this confusion among the federal courts, California courts must not slavishly follow federal antitrust standing precedent. California courts must recognize that because of historical antecedents, historical context, legislative amendments, and California case law, Cartwright Act standing analysis is distinct from federal antitrust standing analysis. Underlying this distinction is antitrust injury. Although the concept of Cartwright Act antitrust injury remains riddled with ambiguity, Cartwright Act antitrust injury is distinct from its federal counterpart.

The *Vinci* court overlooked these distinctions. The court blindly applied federal antitrust standing analysis without regard to the dis-

262. Employees who refuse to participate include both the employee who refuses to act and the one who refuses to remain silent, namely, the whistleblower.

tinctive history of the Cartwright Act. Additionally, the court failed to acknowledge the ambiguity in the federal antitrust injury definition. In doing so, the court missed an opportunity to take advantage of the distinctive enforcement qualities of wrongfully discharged employees. *Vinci* should be overruled. California courts should take advantage of the unique position of wrongfully discharged employees and grant them standing under the Cartwright Act.